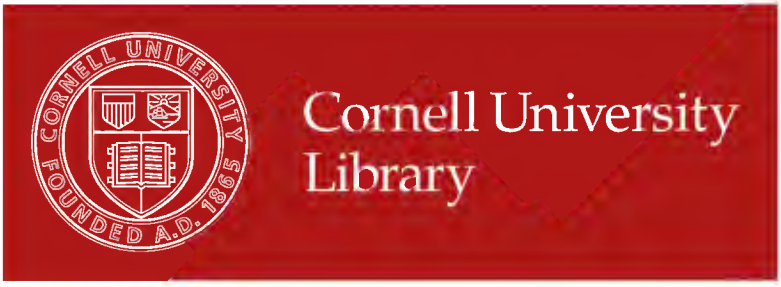

A DIGEST

OF

THE INTERNATIONAL LAW

OF THE

UNITED STATES,

TAKEN FROM

DOCUMENTS ISSUED BY PRESIDENTS AND SECRETARIES OF STATE,

AND FROM

DECISIONS OF FEDERAL COURTS AND OPINIONS OF ATTORNEYS-GENERAL.

EDITED BY

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IN THREE VOLUMES.

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CHAPTER VI.

TREATIES.

I. *NEGOTIATION.*

§ 130.

As to diplomatic discretion and correspondence, see *supra*, §§ 78 ff.
As to Indian treaties, see *infra*, § 210.

When treaties are exchanged between two sovereigns, the better practice is for the representative of each sovereign to take priority over that of the other in the copy of the treaty which is to be retained by his own government.

Mr. Monroe, Sec. of State, to Mr. J. Q. Adams; Mar. 13, 1815. MSS. Inst., Ministers.

"It is the practice of the European Governments, in the drawing up of their treaties with each other, to vary the order of naming of the parties, and of the signatures of the plenipotentiaries, in the counterparts of the same treaty so that each party is first named, and its plenipotentiary signs first in the copy possessed and published by itself. This practice has not been invariably followed in the treaties to which the United States have been parties, and having been omitted in the treaty of Ghent, it became a subject of instructions from this Department to your predecessor. The arrangement was therefore insisted on at the drawing up and signing of the commercial convention of July 3, 1815, and was ultimately acquiesced in on the part of the British Government, as conformable to established usage. You will consider it as a standing instruction to adhere to it, in the case of any treaty or convention that may be signed by you."

Mr. Adams, Sec. of State, to Mr. Rush, Nov. 16, 1817. MSS. Inst., Ministers.

"I deem it to be my duty to state that the recall of Mr. Trist, as commissioner of the United States, of which Congress was informed in my annual message, was dictated by a belief that his continued presence

with the Army could be productive of no good, but might do much harm by encouraging the delusive hopes and false impressions of the Mexicans, and that his recall would satisfy Mexico that the United States had no terms of peace more favorable to offer. Directions were given that any propositions for peace which Mexico might make should be received and transmitted, by the commanding general of our forces, to the United States.

"It was not expected that Mr. Trist would remain in Mexico, or continue in the exercise of the functions of the office of commissioner, after he received his letter of recall. He has, however, done so, and the plenipotentiaries of the Government of Mexico, with a knowledge of the fact, have concluded with him this treaty. I have examined it with a full sense of the extraneous circumstances attending its conclusion and signature, which might be objected to; but, conforming as it does, substantially, on the main questions of boundary and indemnity, to the terms which our commissioner, when he left the United States in April last, was authorized to offer, and animated as I am by the spirit which has governed all my official conduct towards Mexico, I have felt it to be my duty to submit it to the Senate for their consideration, with a view to its ratification."

President Polk, Mexican Treaty Message, Feb. 22, 1848.
As to criticisms on this negotiation, see *infra*, § 154.

"Until about the beginning of the eighteenth century treaties between European powers were generally written in Latin, but it has since been customary for negotiators of countries which do not use the same language to prepare their treaties in both languages; for instance, in the case of an American negotiating with a German plenipotentiary, the English version would appear side by side, article for article, with the German; and in Spain, or in the Spanish-American Republics, the English and Spanish languages would be used in the same way. Treaties between the United States and the British Government have been signed in the English language only. Our treaties with Russia are an exception to the general rule, most of them being written in French and English.

"The French language is much used in diplomatic and social intercourse in Europe between persons of different nationalities. It is there generally so far regarded the common medium of communication that it is the exception to the rule to find a person in polite society who is not able to converse in and write it."

Mr. Fish, Sec. of State, to Miss Fraser, Nov. 18, 1874. MSS. Dom. Let.

"The effect of adhesion to a treaty is to make the adhering power as much a party to all its provisions and responsibilities as though a like treaty had been concluded *ad hoc* between it and the other signatory. For example, were the United States to 'adhere' to the proposed treaty between Great Britain and Zanzibar and effect such 'adhesion'

in such a way as to internationally bind themselves and Zanzibar, each and every provision would necessarily be enforceable as between the United States and Zanzibar, including the assumption on the part of the United States of control over certain subjects of future arrangement between Zanzibar and any third power."

Mr. Bayard, Sec. of State, to Mr. von Alvensleben. May 6, 1886. MSS. Notes, Germ. Same to Sir L. West, May 6, 1885. MSS. Notes, Gr. Brit.

Commissioners to execute a treaty must all agree to the same, and subscribe their names and attach their seals thereto.

1 Op., 66, Lee, 1796.

As to presents to ministers negotiating treaties, see *supra*, § 110.

"Whenever a diplomatic agent of the United States is intrusted with the negotiation of a treaty or convention, a full power will be given to him.

"In case of urgent need a written international compact between a diplomatic agent and a foreign Government may be made in the absence of specific instructions or powers. In such cases it is preferable to give to the instrument the form of a simple protocol, and it should be expressly stated in the instrument that it is signed subject to the approval of the signer's Government.

"The diplomatic agents of the United States will adhere to the principle of the '*alternat*,' in all cases where they shall have occasion to sign any treaty, convention, or other document with the plenipotentiaries of other powers.

"For the convenience of diplomatic agents who may be instructed or empowered to negotiate and sign a treaty of convention with the Government of a country where another language than English is officially employed, the following explanatory regulations touching the clerical preparation of such instrument are given:

"A. The texts of the two languages should be neatly engrossed in parallel columns on the same sheet, if possible, or on opposite pages of the same document. Two separate copies in different languages are not advisable, although this expedient is sometimes resorted to in the Eastern countries.

"B. In the copy to be retained by the diplomatic agent and transmitted to this Government, the United States is named first, in all places where the alternative change may conveniently be made throughout both texts. Conversely in both texts throughout the treaty the foreign Government is first named in the copy which it retains.

"C. The language of the Government which is to retain and publish the convention should always occupy the left-hand place in the copy to be delivered to it.

"D. The utmost care should be taken to insure the substantial equivalence of sense of the two texts, so as to exclude any erroneous effect due to translation. While a strictly literal translation is often harsh, and sometimes impossible, the absolute identity of the idea conveyed is indispensable. To this end the punctuation of the two texts should also be attentively scrutinized and brought into substantial conformity.

"E. Inasmuch as in this country the pleasure of the Senate must be awaited before the treaty can be ratified, and as delays may accordingly supervene, it is the preference of this Government that it be provided

that the ratification and the exchange of ratifications shall be effected 'as soon as possible' rather than within a specified time."

Printed Pers. Inst., Dip. Agents, 1885.

Coercion, while invalidating a contract produced by it, does not invalidate a treaty so produced. Thus there can be no question of the binding force of the treaty which followed the French-German war which led to the dethronement of Napoleon III, though its terms were assented to under coercion. The same may be said of the consent of France to the settlement enforced by the allies after Waterloo, and so the treaty by which Mexico ceded California and the adjacent territory to the United States. On the other hand a treaty produced by material fraud or by physical force applied to the negotiator, may be repudiated.

See Woolsey Int. Law, § 100.

"It is commonly laid down that neither the plea of 'duress' nor that of '*laesio enormis*' (a degree of hardship that is so plain and gross that the sufferer cannot be supposed to have contemplated what he was undertaking)—pleas recognized, directly or circuitously, in one form or another, by municipal law, both ancient and modern, can be allowed to justify the non-fulfillment of a treaty. To cases of personal duress this, of course, does not apply. Any force or menace applied to the *person* of a negotiator is on the face of it unlawful, because a consent wrung from the pain or terror of an individual cannot within any pretense of reason be regarded as the consent of the nation. The cession, therefore, extorted from Frederick the Seventh, at Bayonne, the engagements obtained a few years back from Mr. Eden by the chiefs of Bhootan, were void. They were beyond the reason, and therefore beyond the scope, of the rule. But the intolerable hardships and sufferings inflicted by France on Prussia after the battle of Jena did not invalidate the peace of Tilsit, or the series of subsequent conventions which bound the conquered but unsubdued nation in fetters of steel."

Bernard on Diplomacy, 185.

II.—*RATIFICATION AND APPROVAL.*

(1) As to treaty-making power.

§ 131.

"It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty, negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or Government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians; for, though such treaties, being, on their part, made by their chiefs or rulers, need not be ratified by them, yet, being formed on our part by the agency of subordinate officers, it seems to me both prudent and reasonable that their acts should not be binding on the nation, until approved and ratified by the Government. It strikes me that this point should be well considered

and settled, so that our national proceedings in this respect may become uniform, and be directed by fixed and stable principles."

President Washington, Special Message, Sept. 17, 1789.

The propriety of a partial approval of a treaty by the Senate was doubted by the British Government in 1804.

See Mr. Monroe, minister to England, to the Sec. of State, June 3, 1804. MSS. Dept. of State. 3 Am. St. Pap. (For. Rel.), 93. As to these negotiations, see *infra*, § 150*b*.

As to the modifications by the Senate of the convention with France of 1800, see *infra*, § 148*a*.

As to action of Senate on Dallas-Clarendon Treaty, see *infra*, § 150*e*.

Mr. Jefferson's explanation of his non-acceptance of the treaty negotiated by Messrs. Monroe and Pinkney with Great Britain is as follows: "You heard in due time from London of the signature of a treaty there between Great Britain and the United States. By a letter we received in January from our ministers at London we found they were making up their minds to sign a treaty in which no provision was made against the impressment of our seamen, contenting themselves with a note received in the course of their correspondence from the British negotiator, assuring them of the discretion with which impressment should be conducted, which could be construed into a covenant only by inferences, against which its omission in the treaty was a strong inference, and in its terms totally unsatisfactory. By a letter of February the 3d they were immediately informed that no treaty not containing a satisfactory article on that head would be ratified, and desiring them to resume the negotiations on that point. The treaty having come to us actually in the inadmissible shape apprehended, we, of course, hold it up until we know the result of the constructions of February the 3d. I have but little expectation that the British Government will retire from their habitual wrongs in the impressment of our seamen, and am certain that without that we will never tie up our hands by treaty from the right of passing a non-importation or non-intercourse act, to make it her interest to become just."

Mr. Jefferson, President, to Mr. Bowdoin, April 2, 1807. 5 Jeff. Works, 64. See further, *infra*, § 150*b*. As to Mr. Monroe as a negotiator, see *supra*, § 107.

To Mr. Monroe Mr. Jefferson afterwards wrote as follows: "The treaty was communicated to us by Mr. Erskine on the day Congress was to rise. Two of the Senators inquired of me in the evening whether it was my intention to detain them on account of the treaty. My answer was 'that it was not; that the treaty containing no provision against the impressment of our seamen, and being accompanied by a kind of protestation of the British ministers, which would leave that Government free to consider it as a treaty or no treaty, according to their convenience, I should not give them the trouble of deliberating on it.' This was substantially and almost verbally what I said whenever spoken to about it,

and I never failed, when the occasion would admit of it, to justify yourself and Mr. Pinkney by expressing my conviction that it was all that could be obtained from the British Government; that you had told their commissioners that your Government could not be pledged to ratify because it was contrary to your instructions; of course, that it should be considered but as a project, and in this light I stated it publicly in my message to Congress on the opening of the session."

President Jefferson to Mr. Monroe, Mar. 10, 1808. 5 Jeff. Works, 254. See *infra*, § 150*b*.

That Mr. Monroe was greatly disappointed and hurt at this action of the Administration is shown by the Monroe Papers, on deposit in the Department of State.

For a detailed account of the Monroe-Pinkney negotiations, see *infra*, § 150*b*; and as to Mr. Monroe, see *supra*, § 107; *infra*, § 150*b*.

"It has sometimes been assumed that the President's rejection of the treaty formed by Monroe and Pinkney was the origin of all the hostile feeling in England against us and the foundation of the war of 1812. Canning did afterwards complain that the President had no right to approve what he pleased and condemn what he pleased in the treaty, and instruct the American ministers to attempt to procure amendments in the latter points and consider the former settled. He required that the whole subject be reopened from the beginning, if any part of it was reopened. But in glancing through Monroe's correspondence until he asked his audience of leave, we do not observe an intimation that the rejection of the treaty was complained of or treated as an offensive, and much less a hostile, act."

3 Randall, Life of Jefferson, 235. See *infra*, § 150*b*.

"When one Government has been solemnly pledged to another in a mutual agreement by its acknowledged and competent agent, and refuses to fulfill the pledge, it is perfectly clear that it owes it, both to itself and to the other party, to accompany its refusal with a formal and frank disclosure of sufficient reasons for a step which, without such reasons, must deeply injure its own character, as well as the rights of the party confiding in its good faith."

Mr. R. Smith, Sec. of State, to Mr. Jackson, Oct. 19, 1809. MSS. Notes, For. Leg. 3 Am. St. Pap. (For. Rel.), 311. As to the negotiations with Erskine and Jackson, see *supra*, § 107; *infra*, § 150*b*.

"These facts will, it is presumed, satisfy every impartial mind that the Government of Spain has no justifiable cause for declining to ratify the treaty. A treaty concluded in conformity with instructions is obligatory in good faith in all its stipulations, according to the true intent and meaning of the parties. Each party is bound to ratify it. If either could set aside without the consent of the other there would no longer be any rules applicable to such transactions between nations. By

this proceeding the Government of Spain has rendered to the United States a new and very serious injury. It has been stated that a minister would be sent to ask certain explanations of this Government, but if such were desired, why were they not asked within the time limited for the ratification? Is it contemplated to open a new negotiation respecting any of the articles or conditions of the treaty? If that were done, to what consequences might it not lead? At what time and in what manner would a new negotiation terminate? By this proceeding Spain has formed a relation between the two countries which will justify any measures on the part of the United States which a strong sense of injury and a proper regard for the rights and interests of the nation may dictate."

President Monroe, Third Annual Message, 1819. As to the negotiations to which this message refers, see *infra*, § 161.

"The obligation of the King of Spain, therefore, in honor and in justice to ratify the treaty signed by his minister is as perfect and unqualified as his royal promise in the power, and it gives to the United States the right equally perfect to compel the performance of that promise."

Mr. Adams, Sec. of State, to Mr. Forsyth, Aug. 18, 1819. MSS. Inst., Ministers.

"I have the honor to state that the President considers the treaty of 22d February last as obligatory upon the honor and good faith of Spain; not as a perfect treaty (ratification being an essential formality to that), but as a compact which Spain was bound to ratify—as an adjustment of the differences between the two nations, which the King of Spain by his full power to his minister has solemnly promised *to approve, ratify*, and fulfill. This adjustment is assumed as the measure of what the United States had a right to obtain from Spain, from the signature of the treaty. The principle may be illustrated by reference to municipal law, relative to transactions between individuals. The difference between the treaty unratified and ratified, may be likened to the difference between a covenant to convey lands and the deed of conveyance itself. Upon a breach of the covenant to convey, courts of equity decree that the party has broken his covenant, shall convey, and further shall make good to the other party all the damage which he has sustained by the breach of covenant.

"As there is no court of chancery between nations, their differences can be settled only by agreement or by force. The resort to force is justifiable only when justice cannot be obtained by negotiation—and the resort to force is limited to the attainment of *justice*. The wrong received marks the boundaries to the right to be obtained.

"The King of Spain was bound to ratify the treaty; bound by the principles of the law of nations applicable to the case; and further bound by the solemn promise in the full power. He refusing to perform this

promise and obligation, the United States have a perfect right to do what a court of chancery would do in a transaction of a similar character between individuals to compel the performance of the engagement as far as compulsion can accomplish it, and to indemnify themselves for all the damages and charges incident to the necessity of using compulsion, and they are further entitled to indemnity for all the expenses and damages which they may sustain by consequence of the refusal of Spain to ratify. The refusal to ratify gives them the same right to do justice to themselves as the refusal to *fulfill* would have given them if Spain had ratified and then ordered the governor of Florida not to deliver over the province."

Mr. Adams, Sec. of State, to Mr. Lowndes, Dec. 16, 1819. MSS. Report Book. See *infra*, § 161, *ff*.

"It is shown by the law of nature that he who has made a promise to any one has conferred upon him a true right to require the thing promised; and that, consequently, not to keep a perfect promise is to violate the right of another, and is as manifest an injustice as that of depriving a person of his property. All the tranquillity, the happiness and security of the human race rests on justice, on the obligation of paying a regard to the rights of others. The respect of others for our rights of domain and property constitutes the security of our actual possessions. The faith of promises is our security for the things that cannot be delivered or executed on the spot. There would be no more security, no longer any commerce between mankind, did they not believe themselves obliged to preserve their faith and keep their word. This obligation is then as necessary as it is natural and indubitable between the nations that live together in a state of nature and acknowledge no superior upon earth to maintain order and keep peace in their society. Nations and their conductors ought then to keep their promises and their treaties inviolable. This great truth, *though too often neglected in practice*, is generally acknowledged by all nations." (Vattel, liv. 2, ch. 12, § 163.)

Adopted by Mr. Adams, Sec. of State, in his letter to Mr. Vives, May 6, 1820. MSS. Notes, For. Leg. Mr. Adams Sec. of State to Mr. Forsyth, Aug. 18, 1819. MSS. Inst., Ministers.

"Everything that has been stipulated by an agent in conformity with his full powers ought to become obligatory for the state from the moment of signing, without ever waiting for the ratification. However, not to expose a state to the errors of a single person, it is now become a general maxim that public conventions do not become obligatory until ratified. The motives of this custom clearly proves that the ratification can never be refused with justice, except when he who is charged with the negotiation, keeping within the extent of his public full powers has gone beyond his secret instructions and consequently

rendered himself liable to punishment; or when the other party refuses to ratify." (Martens, liv. 2, ch. 3, § 31.)

Adopted by Mr. Adams, Sec. of State, in letter to Mr. Vives, May 8, 1820. MSS. Notes, For. Leg.; also by Mr. Adams to Mr. Forsyth, Aug. 18, 1819, *ut supra*.

"The refusal to ratify a second treaty within the time stipulated, and then to send a minister to demand new conditions, the sanction of which was to depend upon the Government of Madrid without his becoming responsible for it, was an occurrence with which I have known no parallel."

Mr. Monroe, President, to Mr. Gallatin, May 26, 1820. 2 Gallatin's Writings, 140. See *infra*, 161*a*.

"It may be replied that in all cases of a treaty thus negotiated, the other contracting party being under no obligation to ratify the compact before it shall have been ascertained whether, and in what manner, it has been disposed of in the United States, its ratification can in no case be rendered unavailing by the proceedings of the Government of the United States upon the treaty; and that every Government contracting with the United States, and with a full knowledge that all their treaties until sanctioned by the constitutional majority of their Senate are, and must be considered, as merely inchoate and not consummated compacts, is entirely free to withhold its own ratification until it shall have knowledge of the ratification on their part. In the full powers of European Governments to their ministers, the sovereign usually *promises* to ratify that which his minister shall conclude in his name; and yet if the minister transcends his instructions, though not known to the other party, the sovereign is not held bound to ratify his engagements. Of this principle Great Britain has once availed herself in her negotiations with the United States. But the full powers of our ministers abroad are necessarily modified by the provisions of our Constitution and promise the ratification of treaties signed by them, only in the event of their receiving the constitutional sanction of our Government."

Mr. Adams, Sec. of State, to Mr. Rush, Nov. 12, 1824. MSS. Inst., Ministers.
President J. Q. Adams's message of Dec. 27, 1825, with correspondence explanatory of the action of the Senate in modifying the slave trade convention of that year, is given in House Doc. 414, 19th Cong., 1st sess. 5 Am. St. Pap. (For. Rel.), 782.

"The Government of His Britannic Majesty is well acquainted with the provisiou of the Constitution of the United States by which the Senate is a component part of the treaty-making power; and that the consent and advice of that branch of Congress are indispensable in the formation of all treaties. According to the practice of this Government, the Senate is not ordinarily consulted in the initiatory state of a negotiation, but its consent and advice are only invoked, after a treaty is concluded, under the direction of the President, and submitted to its consideration. Each of the two branches of the treaty-making authority

is independent of the other, whilst both are responsible to the States and to the people, the common sources of their respective powers. It results, from this organization, that, in the progress of the Government, instances may sometimes occur of a difference of opinion between the Senate and the Executive as to the expediency of a projected treaty, of which the rejection of the Colombian convention affords an example. The people of the United States have justly considered that, if there be any inconveniences in this arrangement of their executive powers, those inconveniences are more than counterbalanced by the greater security of their interests, which is effected by the mutual checks which are thus interposed. But it is not believed that there are any inconveniences to foreign powers of which they can with propriety complain. To give validity to any treaty, the consent of the contracting parties is necessary. As to the mode by which that consent shall be expressed, it must necessarily depend with each upon its own peculiar constitutional arrangement. All that can be rightly demanded in treating is to know the contingencies on the happening of which that consent is to be regarded as sufficiently testified. This information the Government of the United States has always communicated to the foreign powers with which it treats, and to noue more fully than to the United Kingdom of Great Britain and Ireland. Nor can it be admitted that any just cause of complaint can arise out of the rejection by one party of a treaty which the other has previously ratified. When such a case occurs, it only proves that the consent of both, according to the constitutional precautions which have been provided for manifesting that consent, is wanting to make the treaty valid. One must necessarily precede the other in the act of ratification; and, if after a treaty be ratified by one party, a ratification of it be withheld by the other, it merely shows that one is, and the other is not, willing to come under the obligations of the proposed treaty.

"I am instructed by the President to accompany these frank and friendly explanations by the expression of his sincere regret that, from the views which are entertained by the Senate of the United States, it would seem to be unnecessary and inexpedient any longer to continue the negotiation respecting the slave convention with any hope that it can be made to assume a form satisfactory to both parties. The Government of His Britannic Majesty insists, as an indispensable condition, that the regulated right of search, proposed in the convention, should be extended to the American coasts as well as to those of Africa and of the West Indies. The Senate, even with the omission of America, thinks it unadvisable to ratify the Colombian convention, and it is, therefore, clearly to be inferred that a convention with His Britannic Majesty, with a similar omission, would not receive the approbation of the Senate. The decision of the Senate shows that it has made up its deliberate judgment without any regard to the relative state of the military or commercial marine, for all the considerations belonging to a

view of that subject would have urged the Senate to an acceptance of the Colombian convention. It is hoped, therefore, that His Britannic Majesty cannot fail to perceive that the Senate has been guided by no unfriendly feeling towards Great Britain."

Mr. Clay, Sec. of State, to Mr. Addington, Apr. 6, 1825. MSS. Notes, For. Leg. 5 Am. St. Pap. (For. Rel.), 783.

Mere signing, by the Executive, of a treaty containing a clause for its ratification, in the usual form, is no guarantee that the treaty should be ratified, nor does a payment of an installment of money by the Executive as a preliminary payment under such a treaty which provides for a lease of foreign property, bind the Government to future payments.

Mr. Evarts, Sec. of State, to Mr. Delmonte, Feb. 19, 1880. MSS. Notes, Dominican Republic.

Matters exclusively of Executive discretion or of Executive construction may be settled by protocols which, as only affecting Executive action, need not be submitted to the Senate. As an example of protocols of this class may be noticed the "protocol of a conference held at Madrid, on the 12th of January, 1877, between the Hon. Caleb Cushing, minister plenipotentiary of the United States of America, and his excellency Señor Don Fernando Calderon y Collantes, minister of state of His Majesty the King of Spain." Treaties and conventions, 1876. This protocol is given, *infra*, § 230.

As to protocols, see App., vol. iii, § 131. See, also, *infra*, § 221.

"I have the honor to acknowledge the receipt of your note of the 22d ultimo, written from Shelter Island, New York, in relation to the exchange of the ratification of the consular convention between the United States and Belgium, signed by Mr. Delfosse and myself on the 9th of March last, wherein you make special reference to the action of the Senate of the United States in qualifying its approval of that instrument by suppressing the word 'alone' in the sixteenth line of the XIIth article, and at the instance of your Government request to be informed of the motives for the omission of that word, which is found in the previous convention of 1868. You also desire, if possible, to be furnished with the minutes of the debate which took place in the Senate respecting this change in the text of the convention.

"In reply I hasten to inform you that, in view of the independent and co-ordinate function of the Senate of the United States, under the Constitution, in the completion of treaties, the proceedings of that high body in executive session are held under the seal of secresy, and the results alone of its deliberations are communicated to the executive branch of the Government. Hence my inability, which I regret, to communicate to you the information you desire. To understand, however, the motive for the omission of the word 'alone' from the XIIth article of the present convention, it can only be necessary to go back to the like article of the previous convention of 1868 and examine the respective contexts. We find that formerly the word 'alone' was qualified by the addition of the phrase, 'without the exaction of any oath from the

consular officers,' showing that no formality was needed save the written request, without other support, in order to secure the return of deserters from national ships. In the revised convention, among other modifications suggested by experience, the qualifying clause quoted above was omitted as redundant. This redundancy extends to the word 'alone,' which, besides being superfluous to the sense of the clause where it occurs, is, in the English text, ambiguous. It will be perceived that, as it now stands, it may mean either that such written request, so supported, will be sufficient warrant for surrender, or that any other mode of procedure is inadmissible; and it follows that, while the first of these readings conforms with the sense of the French equivalent, either interpretation is redundant. It is, therefore, in my judgment, apparent that the motive for the action of the Senate, in striking out the word 'alone' from the clause in question, is found in the desire to remove, not merely a redundancy, but an ambiguity which had persisted, unnoticed before, from the previous redaction now abandoned, and thus to leave the article free from all obscurity of interpretation as to the sufficiency or necessity of the formality prescribed.

"If, as I take it, the equivalent word 'seule' in the Belgian text is redundant merely, without ambiguity, the question of its retention or suppression may very properly be left to the good judgment of your Government. Speaking in behalf of the Government of the United States, I, for my part, cannot perceive that in either case, whether 'seule' be retained or suppressed, any question as to the proper interpretation of the clause under consideration could arise.

"Trusting that the explanation thus tendered may be entirely satisfactory to your Government, and remove all obstacle to the speedy exchange of the ratifications of the convention, I avail myself of this opportunity to renew to you, sir, the assurances of my high consideration."

Mr. Evarts, Sec. of State to Mr. Neyt, Aug. 13, 1880. MSS. Notes, Belgium; For. Rel., 1880. See *infra*, § 148*a*.

The proclamation of a ratified treaty can be made only by the President of the United States, and cannot be issued by the legation by whom the treaty is negotiated.

Mr. Blaine, Sec. of State, to Mr. Angell, Oct. 10, 1881. MSS. Inst., China.

A ratification by one sovereign of a treaty by another sovereign to which, when signed by him, he attached an explanatory note, is a ratification of the explanation, if constitutionally made.

Clark *v.* Braden, 16 How., 635.

"If, then, an embassador, in conformity with a full power received from his sovereign, has negotiated and signed a treaty, is the sovereign justified in withholding his ratification? This question has no significance in regard to states, by whose form of government the engagements made by the executive with foreign powers need some further

sanction. In other cases, that is wherever the treaty-making power of the sovereign is final, the older writers held that he was bound by the acts of his agent, if the latter acted within the full power which he had received, even though he had gone contrary to secret instructions. But Bynkershoek defended another opinion which is now the received one among the text-writers, and which Wheaton has advocated at large with great ability. (Wheaton's El., B. III, 2, § 5; Bynkershoek, Quæst. J. P., II, 7; de Martens, § 48.) If the minister has conformed at once to his ostensible powers and to his secret instructions, there is no doubt that in ordinary cases it would be bad faith in the sovereign not to add his ratification. But if the minister disobeys or transcends his instructions, the sovereign may refuse his sanction to the treaty without bad faith or ground of complaint on the other side. But even this violation of secret instructions would be no valid excuse for the sovereign's refusing to accept the treaty, if he should have given public credentials of a minute and specific character to his agent; for the evident intention in so doing would be to convey an impression to the other party that he is making a sincere declaration of the terms on which he is willing to treat.

"But even when the negotiator has followed his private instructions, there are cases, according to Dr. Wheaton, where the sovereign may refuse his ratification. He may do so when the motive for making the treaty was an error in regard to a matter of fact, or when the treaty would involve an injury to a third party, or when there is a physical impossibility of fulfilling it, or when such a change of circumstances takes place as would make the treaty void after ratification.

"All question would be removed, if in the full power of the negotiators or in a clause of the treaty itself, it were declared that the sovereign reserved to himself the power of giving validity to the treaty by ratification. This, if we are not deceived, is now very generally the case."

Woolsey, § 107.

Some publicists, especially Vattel, consider a minister as invested with the power of a mandatory, and hold that his acts are subject to the same rules as those by which the acts of mandatories are governed. Hence they conclude that as obligations entered into by a mandatory within the scope of his authority bind the mandatant, so the same obligations entered into by a plenipotentiary within the scope of his authority bind his sovereign. (Vattel, droit des gens, liv. II, ch. xii, § 156. Kluber, dr. des gens, § 141; Grotius, de jure belli, liv. II, ch. xi, § 12; Pufendorf, de jure naturæ, liv. III, ch. ix, § 2.) * * * This theory has been rightly contested by other publicists, among whom are Schmalz, Bynkersoëk, Pinheiro-Ferreira, and Wheaton, and more recently by Calvo. (Bynkersoëk, Quest. jur. pub., liv. II, ch. vii; Vergé, note sur Martens, § 48; Schmalz, dr. des gens, ch. iii, 53; Ortolan, Diplomatie de la mer, liv I, ch. v; Wheaton, dr. int., t. I, ch. ii, § 5; Heffter, dr. int., § 85; Calvo, dr. int., § 697.) These authors maintain that a mission confided by a sovereign to his diplomatic agents for the purpose of concluding an international convention on a specific basis cannot be assimilated to a mandate, and is not, therefore, governed by the rules by which mandates are governed. * * * As a matter of strict law we cannot accept the rule of Bluntschli that when the representatives of a state have received the necessary power to definitely conclude a treaty, the signature of the protocol or of the special docu-

ment incorporating the treaty definitely binds the contracting parties (Dr. int., § 419), or that of Field (Int. Code, § 192), who admits the necessity of ratification only in cases in which the treaty itself expresses the condition of ratification. In our opinion, the power of contracting a binding international agreement is an act of sovereignty which only the person invested with such sovereignty is capable of performing. A minister is not such a person; he is only a negotiator. Nevertheless, according to the laws of diplomatic comity and of honor, it should be admitted that a sovereign ought not, unless for grave public reasons, to refuse to ratify a treaty signed by an envoy with full power.

2 Fiore, droit int., §§ 991, 993 (French Trans. by Antoine), Paris, 1885.

"The rule that a treaty is vitiated by a material error is logically deducible from the notion of a contract. The rule, on the other hand, that a treaty concluded by an authorized agent who has not exceeded his instructions, has nevertheless no force till it is ratified, cannot be so proved; it appears at first sight to be at variance with ordinary legal analogies, and with morality; and jurists, trespassing beyond their proper province, have commonly laid down that ratification, under such circumstances, is a moral duty. It is, however, a settled rule, with the advantage which a settled rule possesses, of being a thing ascertained and indisputable. It is an extra precaution, an artificial safeguard, against improvident or ill-considered engagements, exactly analogous to those rules of private law which require for certain private contracts a specified form of words, a notarial act, a payment of earnest, or a signature. That it is salutary and convenient is an opinion sound, I have no doubt, but which may be disputed like any other opinion; that it is a settled rule is a fact, which may be proved by evidence, like any other fact."

Bernard on Diplomacy, 174.

(2) As to legislation.

§ 131*a*.

"Having been a member of the general convention, and knowing the principles upon which the Constitution was formed, I have ever entertained but one opinion on this subject, and from the first establishment of this Government to this moment my conduct has exemplified that opinion, that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land. It is thus that the treaty-making power has been understood by foreign nations, and in all the treaties made with them we have declared, and they have believed, that, when ratified by the President, with the advice and consent of the Senate, they became obligatory." * * * "As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of

the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request."

President Washington, Special Message, Mar. 3, 1796, on Jay's treaty.

"By the Constitution of the United States, the department of legislation is confined to two branches only of the ordinary legislature; the President originating and the Senate having a negative. To what subject this power extends has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a mere nullity, *res inter alios acta*. (2) By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and cannot be otherwise regulated. (3) It must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way. (4) And also to except those subjects of legislature in which it gave a participation to the House of Representatives. This last exception is denied by some on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.

"The Constitution thought it wise to restrain the Executive and Senate from entangling and embroiling our affairs with those of Europe. Besides, as the negotiations are carried on by the Executive alone, the subjecting 'to the ratification of the Representatives such articles as are within their participation is no more inconvenient than to the Senate. But the ground of this exemption is denied as unfounded. For, examine, *e. g.*, the treaty of commerce with France, and it will be found that out of thirty-one articles there are not more than small portions of two or three of them which would not still remain as subjects of treaties, untouched by these exceptions.'"

Mr. Jefferson, Man. of Parl. Prac. (N. Y., 1876), 110.

"We conceive the constitutional doctrine to be that though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three branches of legislature, an act of legislation will be requisite to confirm these articles, and that the House of Representatives, as one branch of the legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not. On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate, and House of Representatives to the President, Senate, and Piamingo, or any other Indian, Algerine, or other chief."

Mr. Jefferson to Mr. Monroe, Mar. 21, 1795. 4 Jeff. Works, 134.

The precedents bearing on this question are as follows:

Jay's treaty was approved by the Senate by the requisite two-thirds majority. Its ratification was proclaimed by the President on February 29, 1796, and this proclamation was communicated to the two houses

of Congress on March 1, 1796. On the one side it was maintained that the power of the President and Senate as to treaties was absolute, and that the House of Representatives was bound, under the Constitution, to make the appropriations necessary to carry the treaty into effect. On the other side it was contended that under the Constitution the consent of the House was requisite to pass appropriations to carry the treaty into effect, and that this was as much known to the other contracting party as was the consent of the Senate to the preliminary adoption of the treaty. On the latter assumption the House, on March 24, 1796, called on the President for the facts relative to the treaty. On March 30, 1796, the President declined to give such information, his reasons being stated in a message given above.

As to Jay's treaty, see also *infra*, § 150*a*. See also 8 Lodge's Hamilton, 386, 391.

"The first impression (as to the treaty, when published after its ratification by the Senate) was universally and simultaneously against it. At length, however, doubts began to be thrown out in New York whether the treaty was as bad as was represented. The Chamber of Commerce proceeded to an address to the President, in which they hinted at war as the tendency of rejecting the treaty, but rested the decision with the constituted authorities. The Boston Chamber of Commerce followed the example, as did a few inland villages. As soon as it was known that the President had yielded his ratification, the British party were reinforced by those who bowed to the name of constituted authority and those who are implicitly devoted to the President. The principal merchants of Philadelphia, with others, amounting to about four hundred, took the lead in an address of approbation. * * * It is pretty certain that a majority of the House disapproves the treaty, but it is not yet possible to ascertain their ultimate object, as matters now lie."

Mr. Madison to Mr. Monroe, Dec. 20, 1795. 2 Madison's Writings, 64.

"The situation is truly perplexing. It is clear that a majority, if brought to the merits of the treaty, are against it. But as the treaty is not regularly before the House, and as application to the President brings him personally into the question, with some plausible objections to the measure, there is great danger that enough will fly off to leave the opponents of the treaty in a minority."

Mr. Madison to Mr. Jefferson, Dec. 27, 1795; *ibid.*, 69.

"The business of the treaty with Great Britain remains as it stood. A copy of the British ratification has arrived, but the Executive waits, it seems, for the original, as alone proper for communication. In the mean time, although it is probable that the House, if brought to say yea or nay directly on the merits of the treaty, will vote against it, yet a majority cannot be trusted on a question applying to the President for the treaty."

Mr. Madison to Mr. Monroe, Jan. 26, 1796; *ibid.*, 73. To same effect, Mr. Madison to Mr. Jefferson, Jan. 31, 1796; *ibid.*, 75.

"We are at length embarked in the discussion of the treaty, which was drawn in rather abruptly by a proposition calling on the President for papers. The point in debate is the constitutional right of Congress in relation to treaties. There seems at present strong reasons to conclude that a majority will be in favor of the doctrine that the House has

a constitutional right to refuse to pass laws for executing a treaty, and that the treaty power is limited by the enumerated powers. Whether the right ought, in the present case, to be executed, will be a distinct question on the merits of the treaty, which have not yet come into discussion. I understand that the treaty party expect success on this question, but despair on every other."

Mr. Madison to Mr. Jefferson, Mar. 13, 1796; *ibid.*, 88.

"The newspapers will inform you that the call for the treaty papers was carried by 62 against 37. You will find the answer of the President herewith inclosed. The absolute refusal was as unexpected as the tone and tenor of the message are improper and indelicate. * * * I think there will be sufficient firmness to face it with resolutions declaring the constitutional powers of the House as to treaties, and that, in applying for papers, they are not obliged to state their reasons to the Executive."

Same to same, Apr. 4, 1796; *ibid.*, 89.

"This measure of the Executive produced two propositions, asserting the right of the House to judge of the expedieney of treaties stipulating on legislative subjects, and declaring that it was not requisite in a call for papers to express the use to be made of them. It was expected that a long and obstinate discussion would have attended these defensive measures. Under that idea, I entered into a free but respectful review of the fallacy of the reasons contained in the message, and the day being nearly spent, the committee rose and an adjournment succeeded. The next morning, instead of a reply, the question was called for, and taken without a word of argument on the subject. The two resolutions were carried by 57 against 35; and six members, who, not foreseeing the early call for the question, had not taken their seats, soon appeared and desired to have their names added to the majority. This was not permitted by the rules of the House."

Same to same, Apr. 11, 1796; *ibid.*, 94.

"The treaty question was brought to a vote on Friday in committee of the whole. Owing to the absence (*certainly* casual and momentary) of one member and the illness of another, the committee were divided, 49 and 49. The chairman (Muhlenberg) decided in the affirmative, saying that in the House it would be subject to modification, which he wished. In the House, yesterday, an enemy of the treaty moved a preamble reciting 'that although the treaty was highly objectionable, yet, considering all circumstances, particularly the duration for two years, &c., and confiding in the efficacy of measures that might be taken for stopping the spoliations and impressments, etc.' For this ingredient, which you will perceive the scope of, all who meant to persevere against the treaty, with those who only yielded for the reasons expressed in it, ought to have united in voting, as making the pill a bitter one to the treaty party, as well as less poisonous to the public interests. A few wrongheads, however, thought fit to separate, whereby the motion was lost by one vote. The main question was then carried in favor of the treaty by 50 against 48. This revolution was foreseen, and might have been mitigated, though not prevented, if sooner provided for. But some, who were the first to give way to the crisis under its actual pressure, were not averse to prepare for it. The progress of this business through-

out has been to me the most worrying and vexatious I ever encountered."

Same to same, May 1, 1796; *ibid.*, 99. See *infra*, § 150 *a*.

The answer to the message, which had the sanction of Madison, is as follows:

"*Resolved*, That it being declared in the second section of the Constitution that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur, the House of Representatives do not claim an agency in making treaties; but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress; and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect and to determine and act thereon, as in their judgment may be most conducive to the public good."

It was further resolved "that it is not necessary to the propriety of any application from this House to the Executive for information desired by them, and which may relate to any constitutional functions of the House, that the purpose for which such information may be wanted, or to which it may be applied, should be stated in the application."

Mr. Gallatin, in his speech in the House on March 10, 1796, on Jay's treaty, said, with great force, that "if the treaty-making power is not limited by existing laws, or if it repeals laws that clash with it; or if the Legislature is obliged to repeal the laws so clashing, then the legislative power in fact resides in the President and Senate, and they can, by employing an Indian tribe, pass any law under the color of treaty." "The argument," says Mr. Adams in his life of Gallatin (161), "is irresistible; it has never been answered; and the mere statement is enough to leave only a sense of surprise that the Federalists should have hazarded themselves on such preposterous ground."

The next treaty in which the question distinctively arose was that with France, on April 30, 1803, for the cession of Louisiana. Mr. Jefferson, who was then President, had maintained, as was well known, the position, as above stated, that whenever Congress, in its legislative action, is called upon to make appropriations to carry out a treaty, it had a full constitutional right to refuse its assent. He took care not to appear in any way, when asking for action on the Louisiana treaty, to invade the prerogatives he had so fully recognized in 1796. He sent in a special message, communicating the requisite papers "for the purpose of the consideration of Congress in its legislative capacity" or "for the exercise of their functions as to those conditions which are within the power vested by the Constitution in Congress;" and so far from assuming that this power was to be exercised as a matter of course, he said, "You will observe that some important conditions cannot be carried into execution but with the aid of the legislature." The measures proper for the execution of the treaty were voted without, however, any reassertions of the principle of independent responsibility laid down by the House of Representatives in 1796.

In 1816 the Senate passed a bill to carry into effect the commercial convention of 1815 with Great Britain, the bill so passed providing that

so much of any existing act as might be contrary to the provisions of the convention should be deemed and taken to be of no effect. The House of Representatives, on the other hand, passed a bill enacting seriatim the provisions of the treaty. The Senate refused to concur, on the ground that the treaty was operative of itself, and therefore that the act should be declaratory only. On the other hand the House insisted that legislation was necessary to carry the treaty into effect. A committee of conference, of which Rufus King was chairman of the managers on the part of the Senate, and John Forsyth chairman of the managers on the part of the House, agreed on a bill, which was then adopted. The principle upon which this adjustment was made was thus explained by Mr. Forsyth: "Your committee understood the committee of the Senate to admit the principle contended for by the House, that whilst some treaties might not require, others may require, legislative provision to carry them into effect; that the decision of the question, how far such provision was necessary, must be founded upon the peculiar character of the treaty itself."

The opinion of Mr. Wheaton, on the collision with France, in respect to the treaty with that country of July 4, 1831, has been already noticed (see *supra*, § 9), and in a future section will be discussed the action taken by the United States in relation to the action of the French Chamber of Deputies to carry that treaty into effect by appropriating the sum necessary to meet the indemnity to be paid by France to the United States (*infra*, § 318). It must be remembered, however, that the case of the action of the French Chamber of Deputies in refusing the appropriation under the treaty of 1831 was not that of a mere refusal to approve a treaty relating exclusively to the future, as was the case with Jay's treaty. The debt which the French Chamber refused to pay was one which had been for many years claimed earnestly, almost to the point of a formal declaration of war, by the United States, and had been over and over again admitted to be due by France. When President Jackson, therefore, advised Congress to resort to reprisals to compel payment of this debt, this was not because the French Chamber of Deputies refused to approve a treaty which had been negotiated between the two Governments, but because the French Government had repudiated a debt which the United States had declared to be incontestable, and which the French executive had admitted. Reprisals for repudiation of a debt solemnly acknowledged are recognized by the law of nations, and this was a case of repudiation of a debt solemnly acknowledged. There was no discussion, on the part of President Jackson, of the question as to how far the consent of the French Chamber of Deputies was necessary, under the then French constitution, to the validity of a treaty. All that President Jackson did or said may be regarded as limited to the following position: "You owe this money; we have already pushed our claim to the verge of war, and you have admitted it to be due. You must pay; your admission you cannot dispute, since it was made by your executive, who is the only authority with whom, under the law of nations, we can negotiate."

In 1843 Mr. Wheaton negotiated a commercial treaty with the German states. The Senate Committee of Foreign Relations reported adversely to this treaty, on the ground of the "want of constitutional competency," to make it; and the Senate laid the subject on the table indefinitely. Mr. Calhoun, then Secretary of State, comments thus on this act: "If this be a true view of the treaty-making power, it may be

truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution. From the beginning, and throughout the whole existence of the Federal Government, it has been exercised constantly on commerce, navigation, and other delegated powers."

Mr. Calhoun to Mr. Wheaton, June 28, 1844; MSS. Inst., Germ.

The question of the prerogatives of the House, when the efficiency of a treaty depends upon its action, came again into prominence in relation to the treaty of 1868 with Russia for the cession of Alaska. (See *infra*, § 159.) In that treaty it was provided that the territory should be transferred on the exchange of ratifications (art. 4), and that Russia should be paid an indemnity of $7,200,000. The treaty was ratified by the Senate on May 28, 1867, there being but two voices in the negative. On June 20, 1867, President Johnson issued a proclamation in which, after reciting the treaty, he declared: "Now, therefore, be it known that I, Andrew Johnson, President of the United States, have caused the said treaty to be made public to the end that the same and every clause and article thereof may be observed and fulfilled with good faith by the United States and the citizens thereof." The territory was transferred by Russia to the United States on October 18, 1867. When, however, the question of appropriation came before Congress at the ensuing session, it was at once seen that there was a marked division of opinion. The majority of the Committee of Foreign Affairs in the House of Representatives reported as follows: "The committee reports to the House the following bill, making an appropriation to carry the treaty into effect, with a recommendation that it be enacted into a law: 'A bill to enable the President of the United States to fulfill the treaty between the United States and Russia of March 30, 1867. Be it enacted by the Senate and House of Representatives, that there be, and hereby is, appropriated $7,200,000 in coin to fulfill the stipulations contained in the sixth article of the treaty with Russia, concluded at Washington on the 30th day of March, 1867.'" A minority report was made in which the worthlessness of the territory ceded was asserted, and in which the rejection of the purchase was recommended.

The majority report, while conceding that there were cases in which the assent of the House to a treaty might be properly withheld, limited such right to cases plainly inconsistent "with the fundamental principles, purposes, or interests of the Constitution." It was further asserted that "where a treaty is limited to objects consistent with the interests of the Government, its first and highest duty is to enact such measures as are necessary to carry the treaty into effect." It was urged that as the Alaska treaty had infringed no constitutional sanction, laws to carry it into execution should be passed. (As to prior negotiation, see *infra*, §159.) Protracted debate ensued, beginning on June 30 and proceeding through July, the discussion relating far more to the constitutional rights of the House in such issues than as to the expediency of the purchase of Alaska. The tendency of the majority of the House was evidently to sanction the Alaska purchase, but to couple the approval of the treaty with a reservation of the right of the House to approve or disapprove in all cases in which the sanction of the House is necessary to execute a treaty. The following amendment, adopting this view, passed the Committee of the Whole by a vote of 98 to 49, and the House, on July 14, 1867, by a vote of 113 to 43:

"Whereas the President of the United States, on the 30th of March,

1867, entered into a treaty with the Emperor of Russia, by the terms of which it was stipulated that in consideration of the cession by the Emperor of Russia to the United States of certain territory therein described, the United States would pay to the Emperor of Russia the sum of $7,200,000 in coin; and whereas it was further stipulated in said treaty that the United States shall accept of such cession, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; and whereas the subjects thus embraced in the stipulations of said treaty are among the subjects which by the Constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress shall be given to the said treaty before the same shall have full force and effect, having taken into consideration the said treaty, and approving of the stipulations therein, to the end that the same may be carried into effect, therefore,

"SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the assent of Congress is hereby given to the stipulations of said treaty."

The Senate, on July 17, restored the bill to its original shape, in this way rejecting the distinctive position of the House that the consent of Congress as a legislative body is necessary to the payment of money and the incorporation of territory, when provided for in a treaty. This conflict of opinion between the two houses led to the two bills being sent to a conference committee, the Senatorial members of which insisted that the House was absolutely bound to carry out the stipulations of a treaty which was duly ratified by the Senate. (See Congressional Globe for 1867, 4031, 4159, 4392.) The committee, however, finally united on the following measure:

"An act making an appropriation of money to carry into effect the treaty with Russia of March 30, 1867.

"Whereas the President of the United States, on the 30th of March, 1867, entered into a treaty with the Emperor of Russia, by the terms of which it was stipulated that in consideration of the cession by the Emperor of Russia to the United States of certain territory therein described, the United States should pay to the Emperor of Russia the sum of $7,200,000 in coin; and whereas it was further stipulated in said treaty that the United States shall accept of such cession, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; *and whereas said stipulations cannot be carried into full force and effect except by legislation to which the consent of both houses of Congress is necessary*; *therefore*

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that there be and hereby is, appropriated, from any money in the Treasury not otherwise appropriated,* $7,200,000 *in coin, to fulfill stipulations contained in the sixth article of the treaty with Russia, concluded at Washington, on the 30th day of March,* 1867."

This measure, which was adopted in the House by a vote of 91 to 48, has the features of compromise strongly impressed upon it. All that it gives specific legislative assent to is the appropriation of $7,200,000. The preamble asserts, not merely that $7,200,000 is to be paid for the purchase, but that certain inhabitants of the territory should be admitted to certain privileges. The resolution says nothing about the privileges

and confines itself to the appropriation. So far, therefore, as Congress was concerned, there was no action which might be regarded as taking the position that the House has the prerogative of affirming or rejecting, at its discretion, execution of a treaty when such execution is dependent on its action. This right, however, is implied in the resolution of the House adopted on July 14, 1867.

The question, therefore, which was agitated in 1796, whether Congress can, under the Constitution, refuse, in its legislative capacity, to pass acts for the execution of treaties duly ratified, remains still open. Yet two positions may be regarded as accepted in the practical working of our Government. One is that without a Congressional vote there can be no appropriation of money which a treaty requires to be paid. The other is that it should require a very strong case to justify Congress in refusing to pass an appropriation which is called for by a treaty duly ratified.

"Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect, and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of the public faith. The department of the Government that is intrusted by the Constitution with the treaty-making power is competent to bind the national faith in its discretion, for the power to make treaties of peace must be co-extensive with all the exigencies of the nation, and necessarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic negotiations and contracts with foreign powers. All treaties made by that power become of absolute efficacy, because they are the supreme law of the land. There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. If a nation has conferred upon its executive department, without reserve, the right of treating and contracting with other states, it is considered as having invested it with all the power necessary to make a valid treaty. That department is the organ of the nation, and the alienations by it are valid, because they are done by the reputed will of the nation. The fundamental laws of a State may withhold from the executive department the power of transferring what belongs to the States, but if there be no express provision of that kind the inference is that it has confided to the department charged with the power of making treaties a discretion commensurate with all the great interests and wants and necessities of the nation."

1 Kent's Com., 162.

"If a treaty be the law of the land, it is as much obligatory upon Congress as upon any other branch of the Government, or upon the people at large, so long as it continues in force and unrepealed. The House of Representatives are not above the law, and they have no dispensing power. They have a right to make and to repeal laws, provided the Senate and President concur, but without such concurrence a law in the shape of a treaty is as binding upon them as if it were in the shape of an act of Congress, or of an article of the Constitution, or of a contract made by authority of law. The argument in favor of the binding and conclusive efficacy of every treaty made by the President and Senate

is so clear and palpable, that it has probably carried very general conviction throughout the community; and this may now be considered as the decided sense of public opinion." (*Ibid.*, 286.)

"If a treaty require the payment of money to carry it into effect, and the money can only be raised or appropriated by an act of the legislature, the existence of the treaty renders it morally obligatory on Congress to pass the requisite law, and its refusal to do so would amount to a breach of the public faith, and afford just cause of war. That department of the Government which is intrusted by the Constitution with the power of making treaties is competent to bind the national faith at its discretion; for the power to make treaties must be co-extensive with the national exigencies, and necessarily involves in it every portion of the national sovereignty, of which the co-operation may be necessary to give effect to negotiations and contracts with foreign nations. If a nation confer on its executive department without reserve the right of treating and contracting with other sovereignties, it is considered as having invested it with all the power necessary to make a valid contract, and that it is the organ in making its contracts; and such alienations are valid, because they are made by the reputed assent of the nation."

Duer's Outlines of Constitutional Jurisprudence of the United States, 138.

"The treaty-making power is limited by all the provisions of the Constitution which inhibit certain acts from being done by the Government. It is also limited by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary, of which a striking example is to be found in that which declares that no money shall be drawn from the Treasury but in consequence of appropriations to be made by law. This not only imposes an important restriction on the power, but gives to Congress as the law-making power, and to the House of Representatives, as a portion of Congress, the right to withhold appropriations, and thereby an important control over the treaty-making power, whenever money is required to carry a treaty into effect, which is usually the case, especially in reference to those of the most importance. There still remains another and more important limitation, but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the Government, or to do that which can only be done by the constitution-making power, or which is inconsistent with the nature and structure of the Government."

Calhoun's Discourse on Government. 1 Works, 201.

"D'après la constitution des Etats-Unis, par laquelle les traités faits et ratifies par le président, avec l'avis et le consentement du sénat, sont déclarés être la loi supréme du pays, ou semble comprendre que le congrès est obligé de dégager la foi nationale ainsi engagée, et d'adopter les lois nécessaires à l'execution du traité."

Wheaton, Eléments du droit int. (4th ed.), 241.

Mr. Wheaton's letter to Mr. Butler, Attorney-General, on the refusal of the French Chamber to appropriate the sum necessary for the payment of the fund agreed on by the French indemnity treaty, has been already cited. (*Supra*, § 9; *infra*, § 318. See also Halleck's Int. Law (Baker's ed.) 232, citing Wheaton's Life of Pinkney, 517–'49; 1 Kent's Com., 285; President's Mess., Dec., 1834; Ann. Reg., 1834, 361.) This is another

form of stating the position elsewhere mentioned, that a treaty may bind internationally when it would not bind municipally. (*Supra*, § 9.) The United States, for instance, may by statute impose on its own citizens less stringent rules of neutrality than it imposes on itself by treaty; but such municipal laxity on its part will not relieve it from its obligations by treaty or by international law. (See *infra*, § 402.) A Government also is liable for violations of international duty by its judiciary. (*Infra*, § 329*a*.)

It is not inconsistent with this position that the United States is not liable for a treaty which the Senate refuses to ratify, since no Government is internationally liable on a treaty not agreed to by the treaty-making power. (See *supra*, § 9; *infra*, § 318.)

"The disputed northeastern boundary between Great Britain and the United States involved the territory of the State of Maine, in which Massachusetts also had an interest. The line established by the Ashburton treaty of 1842 differed from that claimed by Maine, and ceded parts over which Maine had exercised jurisdiction. Still the treaty was a sovereign act of the United States with Great Britain and operated as an international settlement. Neither of the States of Maine or Massachusetts was in any way party to it, or named in it, except in the fifth article, in which the United States agreed to receive and pay over to those States certain portions of a common fund established by consent for the care of the territory while under dispute, and to pay to those States a further sum on account of their assent to the line of boundary described in this treaty. Lord Ashburton disclaimed all responsibility of Great Britain for any matters between the United States and the individual States referred to in that article. Commissioners on the part of Maine and Massachusetts gave their assent to the treaty before it was concluded by the Government; but that was an internal matter, and did not concern Great Britain. Neither is the fact that the United States chose to secure the consent of Massachusetts and Maine conclusive upon the much canvassed question of its constitutional power to have made the treaty without their assent. (United States Laws, viii, 554; Webster's Works, vi, 272, 289; Opinions of Attorneys-General, vi, 756; Kent's Com., i, 166, 167; Woolsey's Introd., § 99; Halleck's Int. Law, 848. The Schooner Peggy, Cranch, i, 103; Ware *v.* Tilton, Dallas, iii, 109.)

"If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation, and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nation, just as much as if the breach had been an affirmative act by any other department of the Government. Each nation is responsible for the right working of the internal system by which it distributes its sovereign functions, and as foreign nations dealing with it cannot be permitted to interfere with or control these, so they are not to be affected or concluded by them to their own injury. (See Kent, i, 165–6; Heffter, § 84; Vattel droit des gens, liv. iv, ch., 2, § 14; Halleck, 854.)

Dana's Wheaton, § 543, note 250.

"Chancellor Kent, I think, expressed astonishment and regret that a resolution, founded on the incidents of Jay's treaty, was passed by the

House of Representatives in 1796, declaring what is now understood to be settled English law and practice, that is, if a treaty depend for the execution of any of its stipulations upon a legislative act, the House could and should determine on the expediency of carrying it into effect or letting it abort. Whether the principle of that resolution was abandoned, or only pretermitted on the emergency of 1816, may be questioned. It disappoints expectation, but in reality is not illogical, that the treaty-making power when in the hands of a hereditary monarch should be more trammeled and restricted than when in the hands of an elective Chief Magistrate and Senate. I trust, however, that should the controversy revive, our Representatives may feel themselves, *maugre* Chancellor Kent, free to be at least as democratic as the British Commons. It is noticeable that the precedent of a parliamentary stand against a treaty was made during the ministry of Pitt, almost contemporaneously with Jay's; and that while on this side of the Atlantic, the popular resistance triumphed, by leading to the withdrawal and abandonment of the measure on our side, notwithstanding an agitation alike universal and violent, we were compelled to swallow, pure and undiluted, the strong concoction of the venerable Chief Justice."

Mr. Dallas to Mr. Ingersoll, May 21, 1860. 2 Dallas's Letters from London, 209.

That a treaty cannot invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no writer in our own tongue. "Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the 'treaty-making power' be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives. The Constitution gives Congress the control of the Army. Participation in this control would be snatched from the House of Representatives by a treaty with a foreign power by which the United States would bind itself to keep in the field an army of a particular size. The Constitution gives Congress the right of declaring war; this right would be illusory if the President and Senate could by a treaty launch the country into a foreign war. The power of borrowing money on the credit of the United States resides in Congress; this power would cease to exist if the President and Senate could by treaty bind the country to the borrowing of foreign funds. By the Constitution 'no money shall be drawn from the Treasury, but in consequence of appropriations made by law;' but this limitation would cease to exist if by a treaty the United States could be bound to pay money to a foreign power. * * * Congress would cease to be the law-making power as is prescribed by the Constitution; the law-making power would be the President and the Senate. Such a condition would become the more dangerous from the fact that treaties so adopted, being on this particular hypothesis superior to legislation, would continue in force until superseded by other treaties. Not only, therefore, would a Congress consisting of two houses be made to give way to an oligarchy of President and Senate, but the decrees of this oligarchy, when once

made, could only be changed by concurrence of President and of Senatorial majority of two-thirds."

Ueber den Abschluss von Staatsverträgen, von Dr. Ernest Meier, Professor der Rechte an der Universität Halle, Leipzig, 1874.

Although the action of Congress in its legislative capacity may be necessary to carry into effect a treaty duly approved by the President and Senate, such action may be regarded as a political duty under ordinary circumstances, and in no case has such legislative aid been heretofore refused.

6 Op., 296, Cushing, 1854.

A treaty which does not require legislation to make it operative will be executed by the courts from the time of its proclamation.

6 Op., 750, Cushing, 1854; Foster *v.* Neilson, 2 Pet., 314; U, S. *v.* Arredondo, 6 Pet., 725.

III. *WHEN TREATY GOES INTO EFFECT.*

§ 132.

As respects performance of the conditions of a grant by a private grantee, the date of a treaty is the date of its final ratification.

U. S. *v.* Arredondo, 6 Pet., 691.

So far as concerns individual rights of parties interested, a treaty does not operate until there has been an interchange of ratifications. So far as concerns the relations of the sovereigns concerned, it operates, when ratified, from the date of its signature.

Haver *v.* Yaker, 9 Wall., 32; Davis *v.* Concordia, 9 How., 280; Hylton *v.* Brown, 1 Wash. C. C., 343. See Montault *v.* U. S., 12 How., 47.

The treaty by which France ceded Louisiana to the United States took effect from its date, April 30, 1803. Its subsequent ratification and the formal transfer of possession have relation to that date.

U. S. *v.* Reynes, 9 How., 127.

The same rule applies to the treaty of St. Ildefonso, October 1, 1800, by which France acquired Louisiana from Spain.

U. S. *v.* Reynes, 9 How., 127; Davis *v.* Concordia, *ibid*, 280.

Unless otherwise provided, treaties, in their public relations, take effect from signature, to which period the ratification relates back.

Davis *v.* Concordia, 9 How., 280.

While a treaty is the supreme law of the land, and operates as such in all matters not requiring legislative action, yet, when made dependent on legislative action, it does not take effect until such action is had.

Foster *v.* Neilson, 2 Pet., 253; U. S. *v.* Percheman, 7 Pet., 54; Garcia *v.* Lee, 12 Pet., 511; Haver *v.* Yaker, 9 Wall., 32; Turner *v.* Baptist Union, 5 McLean, 344; Bartram *v.* Robertson, 15 Fed. Rep., 212.

"The general rule of public law is that a treaty 'is binding on the contracting parties from the date of its signature, unless it contain an express stipulation to the contrary.' (Wheaton's Int. Law, 306.)"

Mr. Buchanan, Sec. of State, to Mr. Clay, Sept. 18, 1847. MSS. Inst., Peru.

"A treaty is binding on the contracting parties unless otherwise provided, from the day of its date." (Davis *v.* Concordia, 9 How., 280; Hylton *v.* Brown, 1 Wash. C. C., 343.) "The exchange of ratifications has, in such case, a retroactive effect, confirming the treaty from its date. But a different rule prevails when the treaty operates on individual rights. The principle of relation does not apply to rights of this character which were vested before the treaty was ratified; it is not considered as concluded until there is an exchange of ratifications. Haver *v.* Yaker, 9 Wall., 32; U. S. *v.* Arredondo, 6 Pet., 691."

Mr. J. C. B. Davis, Notes, &c.

"In the case of the indemnity agreed to be paid by Venezuela to American citizens expelled from the Aves Island, it was held: 'It is not necessary to submit to the Senate, for its formal approval, conventions providing for the adjustment of private claims, unless such a course is indicated in the convention itself. But the want of such ratification, on the part of this Government, does not prevent recourse to that formality at any future period, should it be deemed expedient, nor does it in any respect weaken or invalidate the binding effect of the convention upon Venezuela. Indeed, the good faith of that Republic having been pledged to the provisions of the convention by the ratification of the proper authorities, there would be no more hesitation on the part of this Government to enforce its stipulations, should it become necessary, than if the instrument had been ratified by the United States as well as Venezuela.' Senate Ex. Doc. 10, 36th Cong., 2d sess., 472. Mr. Cass to Mr. Sandford, Oct. 22, 1859."

Lawrence's Wheaton (ed. 1863), p. 456.

IV. *CONSTRUCTION AND INTERPRETATION.*

§ 133.

"When a party from necessity or danger withholds compliance with part of a treaty, it is bound to make compensation where the nature of the case admits and does not dispense with it."

Opinion of Mr. Jefferson, Sec. of State, Mar. 18, 1792. 7 Jeff. Works, 572.

"When performance (of a treaty) becomes impossible, nonperformance is not immoral; so if performance becomes self-destructive to the party, the law of self-preservation overrules the laws of obligation to others."

Opinion of Mr. Jefferson, Sec. of State, Apr. 28, 1793. 7 Jeff. Works, 613.

But "it is not the *possibility* of danger which absolves, * * * for that possibility always exists, and in every case."

Ibid. See *Infra*, 137*a*.

"There is no rule of construction better settled, either in relation to covenants between individuals or treaties between nations, than that the whole instrument containing the stipulations is to be taken together, and that all articles in *pari materia* should be considered as parts of the same stipulation."

Mr. Livingston, Sec. of State, to Mr. Lederer, Nov. 5, 1832. MSS. Notes, For. Leg.

"Where, by the express terms of a treaty, the mode of receiving payment of money to be paid is submitted without limitation to the party entitled to receive, he alone can make the designation; and it is equally true that those modes which Governments may and often do accept by express stipulation cannot only be not deemed contrary to the rules and customs generally observed, but may be properly resorted to under a treaty, which, by excluding no particular mode, fairly embraces every one which is appropriate to such transactions between nations, and convenient to the party entitled to receive."

Mr. Livingston, Sec. of State, to Mr. Serurier, June 3, 1833. Notes, For. Leg. See also Mr. McLane to Mr. Serurier, June 27, 1834; *ibid.*

"Nothing is more common in countries where the judiciary is an independent branch of the Government than for questions arising under treaties to be submitted to its decision. Indeed, in all regular Governments, questions of private right arising under treaty stipulations are in their nature judicial questions. With us a treaty is part of the supreme law of the land; as such, it influences and controls the decisions of all tribunals; and many instances might be quoted of decisions made in the Supreme Court of the United States arising under their several treaties with Spain herself, as well as under treaties between the United States and other nations. Similar instances of judicial decisions on points arising under treaties may be found in the history of France, England, and other nations; and, indeed, the undersigned would take the liberty to remind the Chevalier de Argaïz that this very treaty of 1795 has been made the subject of judicial decision by a Spanish tribunal. The undersigned would call to the recollection of the Chevalier de Argaïz the case of M. D. Hareng, in which the Spanish colonial courts decided, according to their sense, of the intention of the treaty of 1795, and the intendant confirmed their decree, which was that nothing in that treaty exempted Mr. Hareng from the payment of certain demands. From this decision this Government was inclined to dissent; but never questioned the right and duty of a Spanish court to consider the intent and effect of a treaty. * * *

"Nations are bound to maintain respectable tribunals to which the subjects of states at peace may have recourse for the redress of injuries and the maintenance of their rights. If the character of these tribunals be respectable, impartial, and independent, their decisions are to be regarded as conclusive. The United States have carried the principle

of acquiescence in such cases as far as any nation upon earth; and in respect to the decisions of Spanish tribunals, quite as frequently perhaps as in respect to the tribunals of any other nation. In almost innumerable cases, reclamations sought by citizens of the United States against Spain for alleged captures, seizures, and other wrongs committed by Spanish subjects, the answer has been, that the question has been fairly tried before an impartial Spanish tribunal, having competent jurisdiction, and decided against the claimant; and in the sufficiency of this answer the Government of the United States has acquiesced. If the tribunal be competent; if it be free from unjust influence; if it be impartial and independent, and if it has heard the case fully and fairly, its judgment is to stand as decisive of the matter before it.

"This principle governs in regard to the decisions of courts of common law, courts of equity, and especially courts of admiralty, where proceedings so often affect the rights and interests of the citizens of foreign states and Governments."

Mr. Webster, Sec. of State, to Mr. de Argaïz, June 21, 1842. MSS. Notes, Spain.

The informal agreement between the United States and Great Britain limiting their respective forces on the lakes is conditioned, so far as concerns the United States, upon Great Britain maintaining scrupulous neutrality in respect to war, civil or otherwise, in which the United States is concerned, and of which the lakes may be the theater.

Mr. Seward, Sec. of State, to Mr. Adams, Oct. 24, 1864. MSS. Inst., Gr. Brit. As to this agreement, see *supra*, §§ 31, 40.

The covenants or guarantees in a treaty, when dependent on certain concessions, cannot be enforced until the concessions are actually made.

Mr. Fish, Sec. of State, to Mr. Baxter, Mar. 20, 1871. MSS. Inst., Cent. Am.; For. Rel., 1871. *Infra*, § 137*a*.

By the treaty of March 20, 1833, between the United States and Siam, the citizens of the former are forbidden to import or sell in Siam (except to the King) "munitions of war." As to the meaning of this term "I feel clear that a *nomen generalissimum*, such as 'munitions of war' is far more comprehensive in its operation than would be any group of specifications, no matter how exhaustive. The rule, as you well know, is that the introduction of specifications operates to limit even general terms which may precede them, and in this view I cannot but think that the terms 'fire-arms, shot, or gunpowder,' which are quoted as used in the treaty between Siam and Great Britain cover a much more restricted area than does the term 'munitions of war.' If, for instance, poisoned arrows were called for in Siam as weapons likely to be peculiarly efficacious in Siamese warfare, they would be excluded under the term 'munitions of war,' but not under those of 'fire-arms, shot, or gunpowder.' The same might be said of preparations of dynamite. I hold, therefore, that the term 'munitions of war' gives all the protection

to Siam, as to the question at issue, that could be secured by an enumeration of particulars, no matter how exhaustive."

Mr. Bayard, Sec. of State, to Mr. Phelps, Jan. 7, 1886. MSS. Inst., Gr. Brit. As to construction, see further, App., vol. iii, § 131.

When there is a treaty giving certain privileges as to repairing armed vessels of a belligerent, such treaty will be enforced by the neutral states, though the favors it confers on the belligerent may be in excess of what would be conferred by the law of nations.

Moodie *v.* The Phœbe Anne, 3 Dall., 319. See Bee's Adm. R., 40, 74.

A stipulation in a treaty that neutral bottoms make neutral goods, does not imply a stipulation that enemies' bottoms make enemies' goods, the two propositions being distinct.

The Nereida, 9 Cranch, 388.

The doctrine of *cy pres* performance has no application in the construction of treaties.

The Amiable Isabella, 6 Wheat., 1.

The court cannot supply a *casus omissus* in a treaty any more than in a law. By the treaty with Spain of 1795 free ships were to make free goods; and in the 17th article it was provided that a passport, issued in accordance with the form annexed to the treaty, should be conclusive proof of the nationality of the vessel. There being, in fact, no form annexed, it was held that the proprietary interest of the ship must be determined according to the ordinary rules of prize courts, and if shown to be Spanish property, that the cargo was protected from liability.

Ibid., 1, 76.

The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them.

Ibid., 1, 73.

Stipulations in treaties having sole reference to the exercise of belligerent rights cannot be applied to govern cases exclusively of another nature, and belonging to a state of peace.

The Mariauna Flora, 11 Wheat., 1.

The laws applicatory to treaties of cession do not apply to treaties for the recognition of independence, such as that of 1783, with Great Britain.

Harcourt *v.* Gaillard, 12 Wheat., 523.

Foreign territory, under the Constitution of the United States, may be acquired under either the treaty-making or the law-making power.

American Ins. Co. *v.* Bales of Cotton, 1 Pet., 542.

The original of the treaty of 1819 with Spain being in the Spanish language, not corresponding precisely with the original in English, the language of the former is to be taken as expressing the intent of the grantor as to the lands granted and reserved. The King of Spain was the grantor; the treaty was his deed; the exception was made by him; and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted and the thing reserved and excepted in and by the grant. The Spanish version was in his words and expressed his intention, and, though the American version showed the intention of this Government to be different, we cannot adopt it as the rule by which to decide what was granted, what excepted, and what reserved. The court must be governed by the clearly expressed and manifest intention of the grantor and not the grantee in private, *a fortiori* in public, grants.

U. S. *v.* Arredondo, 6 Pet., 691.

As to which of the conflicting versions of a treaty is to prevail, see *infra*, § 165.

When a treaty is executed in more than one language, each language being that of a contracting party, each document, so signed and attested, is to be regarded as an original, and the sense of the treaty is to be drawn from them collectively.

Ibid., 710.

A treaty of cession is a deed or grant by one sovereign to another, which transfers nothing to which he had no right of property, and only such right as he owned and could convey to the grantee.

Mitchel *v.* U. S., 9 Pet., 711.

The stipulation in the treaty of cession of Louisiana for the protection of the inhabitants in their property, &c., ceased, by its own limitation, to operate when the State was admitted into the Union.

City of New Orleans *v.* Armas, 9 Pet., 224.

A treaty of cession is to be construed in accordance with the state of things at the time existing.

Strother *v.* Lucas, 12 Pet., 410.

The term "grant" in a treaty comprehends not only those which are made in form, but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession; and that in the term "laws" is included custom and usage, when once settled, though it may be "comparatively of recent date, and is not one of those to the contrary of which the memory of man runneth not, which contributed so much to make up the common-law code."

Strother *v.* Lucas, 12 Pet., 436.

It is a sound principle of national law, and applies to the treaty-making power of this Government, whether exercised with a foreign

nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty.

Lattimer *v.* Potect, 14 Pet., 14.

A treaty is to be construed so as to exclude fraud and to make its operation consistent with good faith.

The Amistad, 15 Pet., 518.

That a reservation in a treaty may operate as a grant of lands, see U. S. *v.* Brooks, 10 How., 442.

It has been settled by the decisions of the Supreme Court (1) that compacts between Governments or nations, like those between individuals, should be interpreted according to the natural, fair, and received acceptation of the terms in which they are expressed; (2) that the obligation of such compacts, unless suspended by some condition or stipulation therein contained, commences with their execution by the authorized agents of the contracting parties, and that their subsequent ratification by the principals themselves has relation to the period of signature; (3) that any act or proceeding, therefore, between the signing and ratification of a treaty, by either of the contracting parties, in contravention of the stipulations of the compact, would be a fraud upon the other party, and could have no validity consistently with a recognition of the compact itself; (4) that a nation which has ceded away her sovereignty and dominion over a territory, can, with respect to that territory, rightfully exert no power by which the dominion and sovereignty so ceded would be impaired or diminished.

U. S. *v.* D'Auterive, 10 How., 609.

A guarantee in a treaty of cession of vested rights in the ceded territory covers only rights which emanated from a prior rightful sovereign.

U. S. *v.* Pillerin, 13 How., 9.

Such a guarantee covers inchoate as well as matured rights.

Delassus *v.* U. S., 9 Pet., 117; Strother *v.* Lucas, 12 Pet., 410.

That benefits granted as equivalents by a treaty are not to be considered as donations, see Forsyth *v.* Reynolds, 15 How., 358.

Whether a sovereign had the power, in making a treaty, to annul a grant, cannot be examined in the courts of the United States, the President and Senate having treated with him as having that power.

Clark *v.* Braden, 16 How., 635.

Where one of the parties to a treaty at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument, or adding a new and distinct stipulation, and the treaty is

afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty, and as binding and obligatory as if it were inserted in the body of the instrument.

Ibid.

A treaty giving certain rights of succession to realty to subjects of a foreign sovereign, is not retroactive so as to affect the succession of a person who died before the treaty.

Prevost *v.* Greenaux, 19 How., 1.

In the fulfillment of treaty stipulations a liberal spirit should be observed.

U. S. *v.* Auguisola, 1 Wall., 352.

A treaty will be so construed as to give full operation to rights granted by it, and when there are two constructions equally applicable to it, the most liberal will be preferred.

Hauenstein *v.* Lynham, 100 U. S., 483.

The term "validity," as applied to treaties, admits of two descriptions—necessary and voluntary. By the former is meant that which results from the treaties having been made by persons authorized by, and for purposes consistent with, the Constitution. By voluntary validity, is meant that validity which a treaty, voidable by reason of violation by the other party, still continues to retain by the silent acquiescence and will of the nation. It is voluntary, because it is at the will of the nation to let it remain or to extinguish it. The principles which govern and decide the necessary validity of a treaty are of a judicial nature, while those on which its voluntary validity depends are of a political nature.

Jones *v.* Walker, 2 Paine, 688.

By a principle of international law, on a transfer of territory by one nation to another, the political relations between the inhabitants of the ceded country and the former Government are changed, and new ones arise between them and the new Government. The manner in which this is to be effected is ordinarily the subject of treaty. The contracting parties have the right to contract to transfer and receive respectively the allegiance of all the native-born citizens; but the naturalized citizens, who owe allegiance purely statutory, are, when released therefrom, remitted to their original status.

Tobin *v.* Walkinshaw, McAllister, 186.

That construction of a treaty most favorable to its execution, as designed by the parties, will be preferred.

U. S. *v.* Payne, 2 McCrary, 289; 8 Fed. Rep., 883.

A construction of a treaty acted on by the Executive Department will be accepted by the judiciary, when relating to matters political, unless such construction be plainly inadmissible.

Castro *v.* De Uriarte, 16 Fed. Rep., 93.

Tonnage dues do not fall within a provision that goods imported in vessels of one contracting nation shall not be higher than those imported in vessels of the other contracting nation.

1 Op., 155, Breckenridge, 1806.

Technical rules of construction ought not to be applied to treaties with the Indians.

2 Op., 465, Taney, 1831.

In the construction of treaties, the general doctrine is that any special advantage conceded by a party under any one article is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty.

6 Op., 148, Cushing, 1853.

Articles of reciprocity, constituting mutual and correlative engagements, do not come within such expressions as "favor," or "freely if the concessions were freely made," or "if the concessions were conditional on allowing the same compensation."

Ibid.

A treaty to whose operation, in whole or in part, legislation is on its face a prerequisite, does not bind, so far as concerns such provisions, until the requisite legislation takes place; though, from the time it is proclaimed, it may take effect as a national compact.

6 Op., 750, Cushing. See *supra*, § 132.

When a river is the line of *arcifinious* boundary between two nations, by a treaty, its natural channel so continues, notwithstanding any changes of its course by accretion or decretion of either bank; but if the course be changed abruptly into a new bed by irruption or avulsion, then the river-bed becomes the boundary. [The principle applied to the report of the commissioners for determining the boundary between the Mexican Republic and the United States.]

8 Op., 175, Cushing, 1856.

Where, by a convention, it was agreed that all moneys awarded by the commissioners under that convention on account of any claim should be paid by one Government to the other, the moneys found due from the foreign Government to claimants who were citizens of the United States were properly paid to the Secretary of State, whose duty it was to have the same paid to those entitled to receive them.

10 Op., 31, Bates, 1861.

The words "confirmed by law" mean confirmation by the act of that power which under our system enacts laws. A confimation by treaty is a confirmation by law, inasmuch as a treaty is to be regarded as an act of the legislature, whenever it operates without the aid of a legislative provision.

10 Op., 507, Coffey, ad int., 1863.

Treaties are subjected to the following general rules which govern all contractual engagements:

(1) There must be a concurrence of minds to one and the same thing.

(2) The interpretation of obscure terms in a treaty is a matter of fact, as to which extrinsic evidence may be taken for the purpose of explaining objective obscurity.

(3) Construction of treaties is a matter of law, to be governed by the same rules *mutatis mutandis*, as prevail in the construction of contracts and statutes.

(4) As contracts may be modified and rescinded, so may treaties.

(5) Immoral stipulations are as void in treaties as they are in contracts.

(6) "Construction" is to be distinguished from "interpretation." "Construction" gives the general sense of a treaty, and is applied by rules of logic; "interpretation" gives the meaning of particular terms, to be explained by local circumstances and by the idioms the framers of the treaty had in mind.

(7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it.

Treaties are distinguishable from contracts as follows:

(1) Contracts (unless we regard marriage as a contract) are, in all cases, the subjects of a suit for debt or damages, or for a specific thing. But no such suit lies on breach of treaty.

(2) Contracts can only be vacated or rescinded by consent, or by the action of a court. But this is not necessarily the case with a treaty. There is no court which can be appealed to to dissolve it, and when one party violates its terms the practice is for the other party to declare it not to be any longer binding.

(3) While a contract may be annulled on the ground of fraudulent influence exercised by strength over weakness, such a reason cannot be set up for regarding a treaty as a nullity, since all nations are supposed to stand on the same footing, with equal opportunities of detecting fraud, and there are many cases of finesse and false coloring or suppression of facts which would avoid contracts, which would not, *mutatis mutandis*, avoid a treaty. If *suppressio veri* abrogated treaties to the extent it abrogates contracts, few treaties would stand.

(4) A treaty based upon a war accepts the results determined by the war, unless otherwise provided, while a contract does not necessarily assume the existing relations of the parties as a basis. "The *uti possidetis* is the basis of every treaty of peace, unless it be otherwise agreed. Peace gives a final and perfect title to captures without condemnation, and, as it forbids all force, it destroys all hopes of recovery (of vessels) as much as if the vessel was carried *infra praesidia* and condemned."

1 Kent's Com., 173, citing The Legal Tender, reported in Wheat. Dig., 302; The Schooner Sophie, 6 Rob. Ad., 138.

(5) A consideration is essential to give effect to a contract, but it is possible to conceive of a treaty which has no consideration.

Whart. Com. Am. Law, § 157.

As to the position of the United States in reference to the effect of silence in treaties, see 3 Phill. Int. Law (3d ed.), 799.

On the question of repugnancy, the following rules are laid down by President Woolsey (Int. Law, § 109):

"1. That earlier clauses are to be explained by later ones, which were added, it is reasonable to suppose, for the sake of explanation, or which at least express the last mind of the parties. So also later treaties explain or abrogate older ones.

"2. Special clauses have the preference over general, and for the most part prohibitory over permissive.

"In treaties made with different parties the inquiry in cases of conflict touches the moral obligation as well as the meaning. Here the earlier treaty must evidently stand against the latter, and if possible, must determine its import where the two seem to conflict.

"In general, conditional clauses are inoperative, as long as the condition is unfulfilled; and are made null when it becomes impossible. Where things promised in a treaty are incompatible, the promisee may choose which he will demand the performance of, but here and elsewhere an act of expediency ought to give way to an act of justice.

"A treaty of cession is a deed of the ceded territory by the sovereign grantor, and the deed is to receive an equitable construction. The obligation of the new power to protect the inhabitants in the enjoyment of their property is but the assertion of a principle of natural justice."

See Mr. J. C. B. Davis's Notes, &c., citing Soulard *v.* U. S., 4 Pet., 511; Delassus *v.* U. S., 9 Pet., 117; Mitchel *v.* U. S., *ibid.*, 711; Smith *v.* U. S., 10 Pet., 326.

The effect of coercion in vacating a treaty is discussed in another section, *infra*, § 130.

V. *FAVORED NATION.*

§ 134.

"It may fairly be considered as the rational and received interpretation of the diplomatic term *gentis amicissimæ* (most favored nation) that it has not in view a nation unknown in many cases (as was the United States at the time when the older treaties containing the phrase were used) at the time of using the term, and so dissimilar in all cases as to furnish no ground of just reclamation to any nation."

Mr. Jefferson, Sec. of State, Report to the President, Mar. 18, 1792. 7 Jeff. Works, 584; 1 Am. St. Pap. (For. Rel.), 255.

"Though treaties, which merely exchange the rights of the most favored nations, are not without all inconvenience, yet they have their conveniences also. It is an important one that they leave each party free to make what internal regulations they please, and to give what preferences they find expedient, to native merchants, vessels, and productions. And as we already have treaties on this basis with France, Holland, Sweden, and Prusia, the two former of which are perpetual, it will be

but small additional embarrassment to extend it to Spain. On the contrary, we are sensible it is right to place that nation on the most favored footing, whether we have a treaty with them or not, and it can do us no harm to secure by treaty a reciprocation of the right."

Report of Mr. Jefferson, Mar. 18, 1792. 7 Jeff. Works, 587; 1 Am. St. Pap. (For. Rel.), 256.

Mr. J. Q. Adams, in his note to Mr. Hyde de Neuville of December 23, 1817 (MSS. Notes, France, Cong. Doc. 91, 18th Cong., 2d sess.), took the ground that the "favored nation" clause in the treaty of 1803 with France only covered gratuitous favors, and did not touch concessions for equivalents, express or implied, and that any other view would be inconsistent with the provision of the Federal Constitution which prescribes that "all duties, imposts, and excises shall be uniform in the United States, and that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.'

Lawrence's Wheaton, 494. See at large, 2 Lyman's Dip. U. S., chap. vi.

"The mutual stipulation of being treated as the most favored nation is not, in all the treaties between France and the United States, accompanied by the *express* declaration that the favor granted to a third party shall be extended to France or the United States gratuitously if the grant is gratuitous, and upon granting the same compensation if it be conditional."

Mr. Adams, Sec. of State, to Mr. de Neuville, Mar. 29, 1821. MSS. Notes, For. Leg. See further, as to meaning of term, same to same, June 15, 1821; *ibid.*

As to effect of term "favored nation" in treaty with France of 1803, see Mr. Gallatin's note to Viscount Chateaubrand, Feb. 27, 1823, quoted *infra*, § 148; and see also Lawrence's Wheaton, 493, notes.

"The rule of the most favored nation may not be, and scarcely ever is, equal in its operation between two contracting parties. It could only be equal if the measure of voluntary concession by each of them to the most favored third power were precisely the same; but as that rarely happens, by referring the citizens of two contracting powers to such a rule, the fair competition between them, which ought always to be a primary object, is not secured, but, on the contrary, those who belong to the nation which has shown least liberality to other nations are enabled to engross almost the entire commerce and navigation carried on between the two contracting powers. The rule of the most favored nation is not so simple as the proposed substitute (that of a treaty of reciprocity, which Mr. Poinsett was instructed to negotiate). In order to ascertain the quantum of favor which, being granted to the commerce and navigation of one nation, is claimed by another in virtue of a treaty stipulation embracing that principle, it is necessary that the claimant should be accurately informed of the actual state of the commercial relations between the nation on which the claim of equal favor is preferred and all the rest of the commercial world. A knowledge of those relations must be sometimes sought after in numerous treaties,

statutes, orders, decrees, and other regulations, and is often of very difficult attainment. When acquired it is not always very easy to distinguish between what was a voluntary grant and that which was a concession by one party for an equivalent yielded by the other. Sometimes the equivalent for the alleged favor proceeding from the one party may be diffused throughout all the stipulations in the treaty by the other, and is to be extracted only after a careful view and comparison of the whole of them. Not unfrequently the equivalent may not even be clearly deducible from the instrument itself conveying the supposed favor. Peculiar considerations may lead to the grant of what, on a first impression, might be conceived to be a voluntary favor, but which has really been founded upon a received equivalent; and these considerations may sometimes apply to the entire commerce and navigation of a country, and at others to particular ports only."

Mr. Clay, Sec. of State, to Mr. Poinsett, Mar. 26, 1825. MSS. Inst., Ministers.

A covenant to give privileges granted to the "most favored nation" only refers to gratuitous privileges, and does not cover privileges granted on the condition of a reciprocal advantage.

Mr. Livingston, Sec. of State, to President Jackson, Jan. 6, 1832. MSS. Report Book.

To same effect, see Mr. Frelinghuysen, Sec. of State, to Mr. Bingham, June 11, 1884. MSS. Inst., Japan, quoted *supra*, § 68.

"Your dispatch No. 43, of the 8th ultimo, has been received. You report that Mr. Carter, the special envoy from Hawaii to England and Germany, had succeeded in inducing the German Government to yield the point assumed by those Governments, that the most favored nation clause in their treaties with Hawaii entitled them to equal privileges in regard to imports with those obtained by the United States by the reciprocity treaty with the same country, and that no definite understanding had been reached with England, although it was probable that the proposition made by that Government would be accepted. You also report that there exists among the natives a suspicion that the United States desire to annex the Hawaiian Islands, which is encouraged and made use of by the opposition party.

"In reply I have to state that the note which you addressed to the minister for foreign affairs, claiming that by the 'parity clause of the ordinary form of treaty' other nations were not entitled to the same privileges as were conceded to the United States by the reciprocity treaty with Hawaii, is in accordance with the views of this Department; and that the assurance given by that officer in his reply, that the Government of Hawaii would take care that the integrity of the treaty should not be impaired in any respect, is satisfactory, and it is hoped that this promise may be strictly carried out.

"You will endeavor to disabuse the minds of those who impute to the United States any idea of further projects beyond the present treaty."

Mr. Evarts, Sec. of State, to Mr. Comly, Aug. 6, 1878. MSS. Inst., Hawaii; For. Rel., 1878.

The following is the inclosure in dispatch No. 43, above noticed:

"I have the honor to submit to His Majesty's Government, through your excellency, my opinion that the integrity of the treaty of reciprocity between the United States and the Hawaiian Island is threatened.

"Allow me to call your attention to a clause of Article IV of the treaty, as follows:

"'It is agreed on the part of His Hawaiian Majesty that so long as this treaty shall remain in force he will not * * * make any treaty by which any other nation shall obtain the same privileges relative to the admission of any articles free of duty hereby secured to the United States.'

"This stipulation is in the nature of a valuable consideration to be paid by one party to the other, as one of the causes which move the contracting parties to enter into an agreement. The failure to pay it would be a breach which would endanger, if not destroy, the whole compact.

"No treaty in existence at the time this compact was entered into secured to any other nation the privileges as to the admission of certain articles free of duty, which have been guaranteed to the United States by this treaty. These privileges were secured, not through any general treaty rights or stipulations, but by giving certain valuable considerations in a special treaty of reciprocal covenants. The concession of these privileges to the United States cannot therefore form any just basis for a claim to like privileges by any other nation, under the parity clause of the ordinary form of treaty. The uttermost that might be conceded under such parity clause would be the claim to purchase the same immunities through special treaty, upon like terms with those agreed upon between the United States and the Hawaiian Islands. But this is in the nature of the case impossible. Those concessions by the United States which are of the greatest value to the islands under this treaty would be of no value whatever from other powers, whose great distance from the best markets for island products would be as effectual a bar to the enjoyment of reciprocity as a prohibitory edict. The effect of such an arrangement would be, if attempted with other powers on the same basis, that the United States would remit some millions of duty on island products during the seven years, in order that other nations might not pay duty to His Hawaiian Majesty on goods brought here to compete with American products.

"This is the precise thing the treaty does not intend. Its intention is to secure exclusive benefits to both contracting parties through special privileges granted by each to the other. To admit the claim of a third party to come in and enjoy all the benefits conceded by both principals, without any payment in equivalent special privileges to either, would be an unprecedented thing.

"It would be strange if the Hawaiian Government and people should fail to take in the advantages secured to them by the treaty, and should suffer its integrity to be impaired. While I cannot believe that there

is real danger of such a result, yet there are circumstances, not necessary to detail particularly, which may excuse this friendly and cautionary mention of some of the rights and privileges of the United States under the treaty."

"While this Government cannot agree with that of Mexico, that under the provisions of the most favored nation clause, another nation becomes entitled to privileges granted by a reciprocity treaty, still as there are various considerations affecting the question as now presented, I content myself with a courteous denial that the most favored nation clause applies to reciprocity treaties, without now entering into any argument on the subject."

Mr. Frelinghuysen, Sec. of State, to Mr. Romero, May 2, 1884. MSS. Notes, Spain.

"Mr. Reed's No. 263, of the 10th instant, informs the Department of an interpellation made in the Senate by the Marquis de Muros in regard to the prospect of negotiations between Spain and the United States for a commercial treaty, and the response of the minister of state thereto. It appears that Señor Elduayen deems a specially favoring treaty impracticable at present in view not only of the distressing condition of the Antillean finances, but because he holds that other nations having the most favored [nation] clause in their treaties with Spain would be entitled to all the benefits of any special arrangement with the United States.

"The minister's statements cannot have failed to impress you with some surprise. You are aware that this Government has always assumed that Spain held the same view as ourselves respecting the effect of a reciprocity treaty in connection with the most favored nation clause in other treaties. This country has that clause in many of its compacts with foreign states, but it has never occurred to them or to us to suppose that we were thereby constrained to grant to those treaty powers without equivalent the privileges which we had by special engagements stipulated to concede to countries like Hawaii and Canada, for a valuable consideration."

Mr. Frelinghuysen, Sec. of State, to Mr. Foster, June 28, 1884. MSS. Inst., Spain.

"I had the honor to receive in due season your note of June 19 last, touching the application of the provisions of the fourteenth section of the shipping act, approved June 26, 1884, in respect of the collection of tonnage tax, to vessels of Belgium coming from ports of that country to ports of the United States, under the "most favored nation" clause of the existing treaty of 1875 between the United States and Belgium.

"The importance of the questions involved in the claim of the Belgian Government, and in like claims preferred by other Governments, has led to the submission of the entire subject to the judgment of the Attorney-General.

"The conclusions of the Department of Justice, after a careful examination of the premises, are that—

"'The discrimination as to tonnage duty in favor of vessels sailing from the regions mentioned in the act, and entered in our ports is, I think, purely geographical in character, inuring to the advantage of *any* vessel of *any* power that may choose to fetch and carry between this country and any port embraced by the fourteenth section of the act. I see no warrant, therefore, to claim that there is anything in the "most favored nation" clause of the treaty between this country and the powers mentioned that entitles them to have the privileges of the fourteenth section extended to their vessels sailing to this country from ports outside of the limitation of the act.'

"These conclusions are accepted by the President, and I have, accordingly, the honor to communicate them to you as fully covering the points presented in your note of the 19th of June last."

Mr. Bayard, Sec. of State, to Mr. De Bounder, Nov. 7, 1885. MSS. Inst., Belgium; For. Rel., 1885. See Mr. Bayard, Sec. of State, to Mr. Tree, Aug. 1, 1885; *ibid.*

"In its commercial aspects the expediency of an unqualified favored nation clause is questionable. The tendency is towards its formal qualification, by recognizing in terms (what most nations hold in fact and in practice, whether the condition be expressed in the clause or not) that propinquity and neighborliness may create special and peculiar terms of intercourse not equally open to all the world; or by providing that the most favored treatment, when based on special or reciprocal concessions, is only to be extended to other powers on like conditions.

"You will doubtless have understood that where the words 'qualified' and 'unqualified' are * * * applied to the most favored nation treatment, they are used merely as a convenient distinction between the two forms such a clause generally assumes in treaties, one containing a proviso that any favor granted by one of the contracting parties to a third party shall likewise accrue to the other contracting party, freely if freely given, or for an equivalent if conditional—the other not so amplified. This proviso, when it occurs, is merely explanatory, inserted out of abundant caution. Its absence does not impair the rule of international law that such concessions are only gratuitous (and so transferable) as to third parties when not based on reciprocity or mutually reserved interests as between the contracting parties. This ground has been long and consistently maintained by the United States. It was held by two of my predecessors, Mr. Clay and Mr. Livingston, that a covenant to extend to third parties privileges granted to a most favored nation only refers to gratuitous privileges and does not cover privileges granted on the condition of a reciprocal advantage, *i. e.*, for a consideration expressed."

Mr. Bayard, Sec. of State, to Mr. Hubbard, July 17, 1886. MSS. Inst., China. See Mr. Bayard to Mr. Manning, Nov. 7, 1885. Same to same, June 16, 1886. MSS. Dom. Let. See also Mr. Hay to Chen Lan Pin, Aug. 23, 1880, quoted *infra*, § 144.

From excessive caution the limitation "gratuitous" or kindred limitations are sometimes inserted before "favored nation" in recent treaties. But this does not in any way derogate from the position that privileges transferable under the term "favored nation" are only such privileges as are gratuitous.

See Lawrence's Wheaton, 493.

Engagements of extradition, whether of fugitives from justice or from service, stand in each case on particular stipulations of treaty, and are not to be inferred from the "favored nation" clause in treaties.

6 Op., 148, Cushing, 1853.

Under the "favored nation" clause of the treaty with Hawaii, the consular courts of the United States in Honolulu have exclusive right of determining disputes among the crews of the United States vessels in that port, a concession of this kind having been made to France.

11 Op., 508, Speed, 1866.

"Engagements of extradition stand on particular stipulations of treaty, and are not to be inferred from the 'favored nation' clause in treaties.

"The 8th article of the convention for the cession of Louisiana provided that after the expiration of twelve years from the date of that treaty the ships of France should be treated upon the footing of the most favored nations in the ports of the ceded territory.

"It was contended by France that this was an absolute agreement, irrespective of the conditions upon which favors were granted to other nations, and that, therefore, when a favor should be granted to another nation for a consideration (reciprocal or otherwise) or upon a condition, France was entitled to enjoy the same favor without consideration or condition. This was denied by the United States. The claim was abandoned by France in the treaty of 1831."

Mr. J. C. B. Davis, Notes, &c.

VI. *SUBSEQUENT WAR, EFFECT OF.*

§ 135.

As a general rule, subject to exceptions in peculiar cases, such obligations of treaties as are transient are considered as dissolved by a subsequent war between the parties.

Mr. Adams, Sec. of State, to Mr. Rush, Nov. 6, 1817. MSS. Inst., Ministers.

"I this day received a letter from C. A. Rodney, the Senator from Delaware, with a new English authority against the doctrine that all treaties are abrogated by war. It is the opinion of Mr. Fox, expressed in Parliament in the debate on the definitive treaty of peace of 1783."

6 Memoirs J. Q. Adams, 54.

The treaty of 1783, so far as concerns boundaries and fisheries and other national privileges and rights, was not abrogated by the war of 1812.

Mr. J. Q. Adams, The Fisheries and the Mississippi, 55 *ff.* *Infra*, §§ 150, 300 *ff.*

"It cannot be necessary to prove that the treaty of 1783 is not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties. To suppose that it is would imply the inconsistency and absurdity of a sovereign and independent state, liable to forfeit its right of sovereignty by the act of exercising it on a declaration of war."

Mr. Gallatin and Mr. Rush, commissioners., 1817, quoted in 2 Lyman's Diplom. U. S., 91. And see more fully *infra*, §§ 150, 304.

"A state of war abrogates treaties previously existing between the belligerents, and a treaty of peace puts an end to all claims for indemnity for tortuous acts committed under the authority of one Government against the citizens or subjects of another, unless they are provided for in its stipulations. A treaty of peace which would terminate the existing war without providing for indemnity would enable Mexico, the acknowledged debtor, and herself the aggressor in the war, to relieve herself from her just liabilities. By such a treaty our citizens who hold just demands against her would have no remedy against either Mexico or their own Government. Our duty to these citizens must forever prevent such a peace, and no treaty which does not provide ample means of discharging these demands can receive my sanction."

President Polk, Third Annual Message, 1847.

"The general rule of international law is that war terminates all subsisting treaties between the belligerent states. Great Britain has maintained this rule to its utmost extent." This, however, is subject to the limitations above stated as to treaty of 1783.

Mr. Buchanan, Sec. of State, to Mr. Pakenham, July 12, 1845. MSS. Notes, Gr. Brit. See Mr. Bayard, Sec. of State, to Messrs. Lehman, June 23, 1885, cited *infra*, § 150.

War does not by itself abrogate treaties or portions of treaties which vest rights of property.

Society, &c., *v.* New Haven, 8 Wheat., 464; Carneal *v.* Banks, 10 Wheat., 181. See Schooner Rapid, 1 Gall., 303.

Kent (Commentaries, vol. i, page 420) says: "As a general rule, the obligations of treaties are dissipated by hostilities. But if a treaty contain any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All those duties of which the

exercise is not necessarily suspended by the war subsist in their full force."

On the question of the effect of war on treaties, see further Field's Int. Code, § 905, citing Bluntschli, § 718; Society, &c., *v.* New Haven, 8 Wheat., 464; debate in the House of Commons on the declaration of Paris of 1856; dispatch of Mr. Marcy to Mr. Mason, of Dec. 8, 1856; speeches of Sir George Lewis and Mr. Bright of March 11 and 17, 1862, and of the Earl of Derby, of Feb. 7, 1862; Phill. Int. Law, iii, app. 21; Dana's Wheaton, Note 143, p. 352.

Treaties stipulating for a permanent arrangement of territorial and other national rights are, at most, suspended during war, and revive at peace, unless they are waived by the parties, or new and repugnant stipulations are made.

Society, &c., *v.* New Haven, 8 Wheat., 464. Mr. J. Q. Adams, The Fisheries and the Mississippi, 55 *ff.*, *infra*, §§ 150, 300 *ff.*
As to effect of war on claims, see *infra*, §§ 240, 337.

In Sutton *v.* Sutton, 1 R. & M., 663, the question whether American subjects who hold land in England were to be considered in respect to such lands as aliens or subjects of Great Britain, or whether the war of 1812 had determined the treaty of 1794, the master of the rolls said: "The privileges of natives being reciprocally given, not only to actual possessors of land, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace."

"Stipulations which relate to boundaries, to the tenure of property, to public debts, etc., and which are permanent in their nature, are suspended by war, but revive as soon as hostilities cease. The treaties of 1783 and 1794 between the United States and Great Britain, respecting confiscation and alienage, were of a permanent character, and the Supreme Court held that they were not abrogated by the war of 1812, although their enforcement was, for the time being, suspended. Stipulations relating to prizes, prisoners of war, blockades, contraband, etc., are unaffected by a declaration of war between the contracting parties, and can only be annulled by new treaties, or in the manner provided in the instruments themselves."

1 Halleck's Int. Law (Baker's ed.), 242; citing 1 Kent's Com., 177; 1 Benton's Thirty Years, 487; Bas *v.* Tingey, 4 Dall., 37.

VII. *SUBSEQUENT ANNEXATION, EFFECT OF.*

§ 136.

The questions arising under this head are noticed in a prior section.

Supra, § 5. See also *infra*, § 240.
As to treaties of annexation, see *infra*, §§ 154, 161.

VIII. *SUBSEQUENT REVOLUTION, EFFECT OF.*

§ 137.

Mr. Hamilton, when the question came up in the Cabinet as to the reception of a minister from the *Republic* of France, "earnestly contended that the reception should be qualified by a formal declaration that the Government of the United States reserved for its future decision the question whether the treaties of 1778, by which the friendly relations between the two countries were originally established and had hitherto been invariably conducted should be considered as still in force and binding on the United States. This proposition he endeavored to sustain by a long and elaborate argument to show that in consequence of the change of government in France, and other considerations much dwelt on by him, the United States had a perfect right, if they thought proper to do so, to renounce the treaty with France, and that they ought at least to declare the operation of these treaties suspended for the present."

3 Rives' Madison, 327. For Hamilton's opinion, see 4 Ham. Works, (ed. 1885), 362.

Mr. Jefferson in reply rested his argument on the position "that the treaties between the United States and France were not treaties between the United States and Louis Capet, but between the two nations of America and France; and the nations remaining in existence though both of them have since changed their forms of government, the treaties are not annulled by these changes."

3 Rives' Madison, 329.

Mr. Jefferson, in writing on April 28, 1793, to Mr. Madison, said, "Would you suppose it possible that it should have been seriously proposed to declare our treaties with France void on the authority of an ill-understood scrap from Vattel, and that it should be necessary to discuss it?"

Mr. Madison, on May 8, replied as follows:

"Peace is, no doubt, to be preserved at any price that honor and good faith will permit. But the least departure from these will not only be most likely to end in the loss of peace, but is pregnant with every other evil that could happen to us. In explaining our engagements under the treaty with France, it would be honorable as well as just, *to adhere to the sense that would at the time have been put upon them.* * * * If a change of government is an absolution from public engagements, why not from those of a domestic as well as foreign nature; and what then becomes of the public debts, &c.? In fact, the doctrine would perpetuate every existing despotism, by involving, in a reform of the Government, a destruction of the social pact, an annihilation of property, and a complete establishment of the state of nature."

3 Rives' Madison, 332. To same effect, see Mr. Jefferson's opinion, of April 28, 1793; 7 Jeff. Works, 613.

Mr. Hamilton (letter to President Washington, April 1, 1793, (4 Ham. Works, 1885, 79), went so far as to argue that the United States were bound, by the principles of the law of nations, to consider the treaty of alliance of the American colonies with France as suspended in consequence of the deposition and execution of Louis XVI, with a right

to renounce the treaties if such further changes should afterwards take place as could "*bona fide* be pronounced to render a continuance of the connections which render them disadvantageous or dangerous."

"In conformity with this, their idea of the defective state of the national authority, you were desired from hence to suspend further payments of our debt to France till new orders, with an assurance, however, to the acting power that the suspension should not be continued a moment longer than should be necessary for us to see the re-establishment of some person, or body of persons, authorized to receive payment and give us a good acquittal (if you should find it necessary to give any assurance or explanation at all). In the mean time we went on paying up the four millions of livres which had been destined, by the last constituted authorities, to the relief of St. Domingo. Before this was completed we received information that a national assembly had met, with full powers to transact the affairs of the nation, and soon afterwards the minister of France here presented an application for three millions of livres to be laid out in provisions to be sent to France. Urged by the strongest attachments to that country, and thinking it even providential that moneys lent to us in distress could be repaid under like circumstances, we had no hesitation to comply with the application, and arrangements are accordingly taken for furnishing this sum at epochs accommodated to the demand and our means of paying it. We suppose this will rather overpay the installments and interest due on the loans of 18, 6, and 10 millions, to the end of 1792, and we shall certainly use our utmost endeavors to make punctual payments of the installments and interest hereafter becoming exigible, and to omit no opportunity of convincing that nation how cordially we wish to serve them. Mutual good offices, mutual affection, and similar principles of government seem to destine the two nations for the most intimate communion; and I cannot too much press it on you to improve every opportunity which may occur in the changeable scenes which are passing, and to seize them as they occur, for placing our commerce with that nation and its dependencies on the freest and most encouraging footing possible."

Mr. Jefferson, Sec. of State, to Mr. Morris, Mar. 12, 1793. MSS. Inst., Ministers. Printed, though inaccurately, in 3 Jeff. Works, 521, 522.

"We have already referred to the opposing views of the two parties in the Cabinet on the effect of the change in the French constitution on existing treaties. In stating his opinion the Secretary of State said: 'I consider the people who constitute a society or nation as the source of all authority in that nation, as free to transact their common concerns by any agents they think proper, to change these agents individually, or the organization of them in form or function, whenever they please. Consequently the treaties between the United States and France were not treaties between the United States and Louis Capet, but between the two nations of America and France, and the nations remaining in existence, though both of them have since changed their forms of government, the treaties are not annulled by these changes.' Mr. Jeffer-

son combated the passage from Vattel (Liv. ii, ch. 12, § 197), on which the Secretary of the Treasury had based his argument for the abrogation of the treaties. After admitting that an ally remains an ally of the state notwithstanding the change of government either by a nation deposing its King or a people of a Republic driving out its magistrates, and acknowledging an usurper, the author had added: 'If, however, this change renders the alliance *useless*, *dangerous*, or *disagreeable* to the other, it may renounce it, for it may say with truth that it would not have allied itself with this nation if it had been under the present form of its government.' Mr. Jefferson showed that Vattel, in this phrase, was not sustained by other writers on the law of nations, particularly Grotius, Puffendorf and Wolf, nor with the general tenor of his own work, nor had it been true would it have been applicable. 'Who,' he asks, 'is the American who can say with truth that he could not have allied himself with France if she had been a Republic or that a Republic of any form would be as disagreeable as her ancient despotism?' He concluded that 'the treaties are still binding, notwithstanding the change of government in France, that no part of them but the clause of guarantee holds out danger even at a distance, and consequently that a liberation from no other part could be proposed in any case; that if that clause may ever bring *danger* it is neither extreme nor imminent nor even probable; that the authority for renouncing a treaty when useless or disagreeable is either misunderstood or in opposition to itself to all other writers, and to every moral feeling; that were it not so those treaties are in fact neither useless nor disagreeable.' Tucker's Life of Jefferson, vol. i, 414, 421." See *infra*, § 148.

"Mr. Hamilton, after assuming that the guarantee applied only to a defensive war, in order to show that that was not the character of the one in which France was engaged, cites from Burlamaqui: 'We must say that generally the first who takes up arms, whether justly or unjustly, commences an offensive war.' (Hamilton's Works, vol. iv, 366, 382. Answers to questions proposed by the President, April, 1793.) Even the proposition is stated in a qualified manner, as applying *en général;* while from what follows it is apparent that Burlamaqui means to give a definition referring to the military operations of a war, and not affecting, in any sense, its political or moral merits. He adds: 'Those who regard the words *offensive war* as an odious term, always implying something unjust, and who consider a *defensive war* as inseparable from justice, confuse all ideas and embarrass a matter of itself sufficiently clear.' (Principes du droit politique, part iv, ch. 3, § 5, p. 802.) The correct view, and which accords with our text, is thus given by Klüber: 'The war is *defensive* (*bellum defensivum*) on the side of the party which only desires to defend its rights, in order to obtain security or reparation; *offensive*, on the contrary (*bellum offensivum*), on the side of the party which attempts to violate the rights of another. This denomination is the same, whether one or the other of the belligerents has commenced the hostilities; for the war is not the less defensive, if the party attacks by virtue of the right of prevention, this right being one of pure defense.' Droit des gens, part II, tit. 2, sec. 2, ch. 1, § 236. See also, to the same effect, Halleck's Int. Law, 329.

"It would seem at this day somewhat extraordinary that the establishment of a Republic in France should be deemed a sufficient ground for the abrogation of our treaties, especially as they had for their avowed object the founding of republican institutions here; while, as is stated by Mr. Wheaton in the text, 'it would show more than an ordinary de-

fect of understanding to confound a war defensive in its *principles* with a war defensive in its *operations*. Where attack is the best mode of providing for the defence of a state, the war is defensive in principle, though the operations are offensive.'

"The causes which led to the wars of the French revolution are well explained in another work of our author (History of the Law of Nations, 344–372), from which it will appear that the object of the coalitions of the great European powers against France was a restoration, contrary to the will of the nation, of the old order of things, and that the declarations of war, on her part, only anticipated the action of her enemies.'

"A proclamation was issued by the President, April 22, 1793, declaring that, 'Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands on the one part, and France on the other, 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 towards the belligerent powers.' (1 Wait's Am. St. Pap. 44.) As to the question of guarantee, 'the President decided that a minister should be received on the same terms as formerly, and that the obligations of the treaties ought to remain in full force, leaving the subject of guarantee for future consideration, aided by a better knowledgeof the condition and prospects of France.' Sparks's Writings of Washington, vol. i, p. 486."

Lawrence's Wheaton (ed. 1863), 490–492. For Mr. Hamilton's argument, see more fully *infra*, § 148. As to this "guarantee," see more fully *infra*, §§ 148, 248.

Mr. Hildreth, of all our historians the most decided in vindicating the views of the old Federalists, states the position of Hamilton and Knox as follows: "They admitted the right of France to change her government, but they questioned her right after such a change to hold the United States to treaties made with a view to a totally different state of things, and which, if now carried out, might impose obligations on the United States, and expose them to dangers never dreamed of when the treaties were made."

4 Hildreth, U. S., 413, 414.

For Mr. Hamilton's pamphlet "Pacificus," see 4 Ham. Works (ed. 1885), 135. For a notice of his consequent discussion with Mr. Madison, see *infra*, § 402.

"I have read your notes of the 8th and of the 17th of March last, and the inclosures of the latter, with the care and attention which I desire to give to everything written under the instructions of your Government.

"By selecting and separating a particular fact in history from the other facts and circumstances with which it is connected, and thus considering it in an isolated form, it is possible to receive entirely erroneous impressions. Such an impression seems to have been formed by you in consequence of a partial consideration of the short extracts from the voluminous correspondence conducted between Holland and the United States after the close of the wars of Napoleon, which are inclosed in your note of the 17th of March.

"A brief review of the history of the commercial relations between the two countries will show how erroneous this impression is.

"The wise founders of this Government, even before the national independence was achieved, recognized the importance to the new nation of cultivating friendship and commercial intercourse with the Netherlands; and their advances in this direction met with an equal consideration at the hands of the States-General. The treaty of 1782 between the two powers is declared to be made 'for establishing the most perfect equality and reciprocity, reserving withal to each party the liberty of admitting at its pleasure other nations to a participation of the same advantages.'

"For this purpose it was mutually agreed that each should enjoy for its subjects and citizens in the ports or territories of the other all rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce which are or should be accorded to the most favored nations by the other, and that the duties or imposts imposed by each upon the subjects or citizens of the other were not to exceed those which were or might be imposed upon the citizens or subjects of the most favored nations. In other words, in was agreed that the rights of each in the territories of the other in these respects should be measured by the largest liberties accorded to the most favored nation.

"The power with which the United States contracted these relations is described in the treaty as 'their High Mightinesses the States-General of the United Netherlands.' In a circular letter from their High Mightinesses, addressed to the States of the United Provinces, dated the 10th of February, 1793, they describe themselves as 'a pacific Republic,' and their principal magistrate is styled by them 'the Stadtholder of the United Netherlands, of which he is not the sovereign, but an illustrious personage, attached to this Republic by eminent dignities, with which he is invested under the sovereignty of the states of the provinces, the union of which represents the sovereignty of the confederation.'

"Hostilities between the United Provinces and France broke out in 1793, and continued with varying fortunes until December, 1795, when the Stadtholder abandoned the country. Another form of republican government was established over what was substantially the same territory, which was styled at first the Republic of the United Provinces and afterward the Batavian Republic. The revolutionary government came into complete possession of political power, so far as related to foreign powers, and was recognized by many of the other powers, among whom were the United States. It was recognized by Great Britain in the treaty of Amiens, to which it was a party.

"Subsequently this republic became a monarchy, with a Bonaparte as king, and this monarchy in a few years disappeared in its turn, and the whole territory of the old seven United Provinces was incorporated into the French Empire, and disappeared as a separate nationality.

"On the abdication of the Emperor Napoleon the allies entered into a secret treaty at Paris, in which it was agreed that the establishment

of a just balance of power in Europe required that Holland should be so constituted as to be enabled to support her independence, and that therefore the countries comprised between the sea, the frontiers of France and the Meuse, should be given up forever to Holland.

"In the following year this secret article was carried into effect in the congress at Vienna. The sixty-fifth article of the general treaty of all the powers and the first article of the particular treaty respecting the Netherlands, alike provide that the old United Provinces of the Netherlands and the former Belgic provinces, and certain other countries therein designated, should form, under the sovereignty of the house of Orange, the Kingdom of the Netherlands. In conformity with their practice to recognize *de facto* Governments, the United States recognized this political change and entered into diplomatic relations with this new Government.

"During these frequent political changes, and mainly during the last two years of the reign of Louis Bonaparte, several vessels of the United States and their cargoes were seized and condemned or confiscated in the ports which had before then formed the territorial domain of their High Mightinesses the States-General. When peace was restored, the United States, who had not been parties to the dismemberment or to the reorganization of continental Europe, made application to the government of the house of Orange for compensation for the injuries which their citizens had suffered in this way. The instructions to make these representations were dated the 9th of May, 1815, before the din of war had ceased.

"A long discussion ensued, conducted in Holland, and extending from 1815 to 1820; but before considering it, in order to preserve a chronological sequence of events, I must refer to certain events which took place in Washington in 1815 and 1816, and which were referred to in my note to you of the 19th of February last.

"The negotiations at Washington were commenced by a note from Mr. Changuion, the then Dutch minister, to Mr. Monroe, the then Secretary of State, dated the 24th of February, 1815, in which he transmitted 'the first overtures which he was instructed to make in order to open negotiations for a treaty of amity and commerce,' and proposed 'as a base for the new treaty to be concluded the text of the old treaty concluded in 1782, with the exception of the changes made necessary by the actual circumstances.'

"Mr. Monroe replied to this on the 15th of April, 1815, thus: 'The treaties between the United States and some of the powers of Europe *having been annulled by causes proceeding from the state of Europe for some time past*, and other treaties having expired, the United States have now to form their system of commercial intercourse with every power, as it were, at the same time. * * * You have proposed to form a new treaty. To this the President has readily agreed. * * *

I have assured you of the willingness of the President to make the ancient treaty between our countries *the basis of the proposed one.*'

"Not long after the receipt of this letter Mr. Changuion was recalled, and after the lapse of some months Mr. Ten Cate replaced him. One of his early acts was to address a note to the Secretary of State (April 4, 1816), in which he said that he 'conceived it proper to communicate to Mr. Monroe the intentions of the King, his master, respecting the overtures made by Mr. Changuion for the purpose of consolidating the commercial relations between the countries *by a renewal or a modification of the treaty of commerce of* 1782.'

"Mr. Monroe, on the 17th of August, 1816, answered this note. In his answer he says: 'Mr. Changuion having intimated, by order of his Government, that the treaty of 1782 was to be considered, in consequence of the events which have occurred in Holland, *as no longer in force*, and having proposed also to enter into a new treaty with the United States, this Government has since contemplated that result. It is presumed that the former treaty *cannot be revived* without being again ratified and exchanged in the form that is usual in such cases, and in the manner prescribed by our Constitution.'

"To the note containing this explicit declaration Mr. Ten Cate returned a long reply on the 16th of September, 1816. As this reply undoubtedly exists in the archives of the legation of His Majesty the King of the Netherlands, in Washington, I content myself with saying that it does not controvert the formal statements of Mr. Monroe. I give the extract which seems most directly to bear upon the point under discussion: '*His Majesty will undoubtedly be disposed to enter into the views of the American Government with regard to the consolidation by some means of the commercial relations between the two states; but in expectation of these happy results His Majesty may take those measures, on the other hand, which appear best adapted to the circumstances of the moment, and to the interests of the navigation and commerce of his subjects.*'

"Thus the status of the treaty of 1782 was apparently disposed of in Washington in accordance with suggestions which the correspondence shows originated in Holland. This disposition would probably have been regarded as final had not the Dutch Government, in the discussions which took place soon after in Holland, denied its liability for the claims already referred to, and asserted, as the ground of discharge from responsibility, that the treaty of 1782 was not in force in Holland at the time when the alleged injuries took place.

"Mr. Monroe had by this time become President, and Mr. John Quincy Adams had succeeded him as Secretary of State. The latter, acting presumably under the directions of the former, finding that the concessions to the wishes of the Dutch Government which the United States was willing to make in 1816 were to be turned in 1818 to the prejudice of citizens of the United States, who had suffered grievous injuries in Holland, endeavored to reopen this question.

"It was in this endeavor that the instructions which you have quoted were written by Mr. John Quincy Adams. They are dated the 10th of August, 1818, but are erroneously printed under the date of August 10, 1824.

"The contention of the United States in this correspondence respecting the treaty of 1782, and respecting the continuity of the political organization with which it was made, is stated concisely in the extract which you have given from this dispatch of Mr. Adams, and I therefore quote it again: 'The *rights* and *obligations* of a nation [the italics are Mr. Adams's] in regard to other states are independent of its internal revolutions of government. * * * On what other ground is it, indeed, that both the Governments of the Netherlands and of the United States now admit that they are still reciprocally bound by the engagements and entitled to claim from each other the benefits of the treaty between the United States and the United Provinces of 1782. If the nations are respectively bound to the stipulations of that treaty now, they were equally bound to them in 1810, when the depredations for which indemnity is now claimed were committed; and when the present King of the Netherlands came to the sovereignty of the country he assumed with it the obligation of repairing the injustices against other nations which had been committed by his predecessors, however free from all participation in them he had been himself.'

"It is understood that the Dutch Government denied these propositions.

"The Baron de Nazel, in his letter of the 14th of June, 1819, to Mr. Everett, speaking of the union of Holland to France, says, '*The political existence of Holland was then terminated;* and again, it may easily be shown that *Holland had ceased for a long time to form an independent state*, under a Government acting for itself and responsible for its conduct.' Again, in the same note, he says, 'The *principle that the present Government of the Netherlands is responsible for all the acts of the preceding Governments from* 1795 *to* 1813, *is one which the King cannot admit without restriction.* If it might be admitted in regard to a succession of legitimate Governments, it could not be in regard to a Government established by violence, and which was not itself responsible for the acts to which it was forced by a foreign usurper; that the political nullity of this Government had long been a matter of public notoriety.' This was understood to mean that there was no recognized responsibility in the new Government for any acts of the Governments of Holland which existed from 1795 to 1813, a period of eighteen years. Unless it means that, it has no meaning.

"Again, the Baron de Nazel, in a note to Mr. Everett, dated the 4th of November, 1819, contends, in answer to a citation made by Mr. Everett from Puffendorf, that the incorporation of an independent state into the territorial domains of another power as a province of that power, works a dissolution of the old body-politic. Referring to the

citation he says: 'It is wished to use it in proof of the position that a nation is not affected by the changes of the Government, and cannot be destroyed but by the dissolution of the body-politic. Puffendorf plainly excepts the case of a state that has become *the mere province of another*, and this case is precisely that of Holland, by its incorporation with France.'

"Finding the Government of the Netherlands firm in denying the continuing force of the treaty of 1782, the then President directed instructions to be sent to the Minister of the United States at The Hague, not to press the claims further. They were dropped and most of them were subsequently, in conformity with the suggestions of the Dutch Government, presented for payment by France under the treaty of 1832, and were allowed and paid. And thus the opinions of the Dutch Government respecting the treaty of 1782, as officially conveyed to Mr. Monroe by Mr. Changuion in 1815, were finally concurred in by the United States, and the question disposed of, as it was supposed, forever.

"The United States found less difficulty in accepting the Dutch views in regard to the dissolution of the old body-politic, which was in existence in 1782, as they found the new body-politic differing from the former one in territory, in name, and in form of government. In place of the Republic of the United Provinces, they found the monarchy of the Netherlands; in place of the united territories of the High Mightinesses, they found the domains nearly doubled by the addition of Brabant and Flanders and part of Germany; in place of a homogeneous people, with united historic associations, they found a political body, avowedly created by the great powers of Europe out of elements that did not exist in a national organization before 1815, for the purpose of preserving a fictitious balance of power. When they found this new body-politic denying (and persisting in the denial) that it was the same body-politic which had existed under another form in the Batavian Republic, and in the Bonaparte Kingdom of Holland, the United States accepted this view.

"In the opinion of the President, this correspondence between Mr. Monroe and Mr. Changuion, taken in connection with the subsequent action of the Dutch Government in denying that the treaty had any valid operative force during the long period of eighteen years, when its existence would have been of advantage to the United States, and also in connection with the acquiescence of the Government of the United States in that action, and its submission of the rejected claims for compensation from France, places beyond doubt the fact that the treaty of 1782, for a period of over fifty years, has been mutually regarded as no longer in force.

"For a long series of years Holland was not in a condition to execute her part of the engagements of that treaty. During this long period there was none of that reciprocity of advantages which is the essence of treaties of amity and commerce, but all that the treaty engaged on the

part of Holland toward the United States was withheld and denied by the Government which controlled her, which Government, nevertheless, had the attitude of separate and independent existence, until finally her existence as a state was extinguished by her actual incorporation into France as a part of that Empire.

"Even if there were not this overwhelming proof of the intent of both Governments I could not concur with you in the opinion that the restitution of this treaty would be confirmed by the doctrine of the right of postliminy. That right belongs to the state of war, and its application is confined to the parties belligerent, or, at the utmost, to them and their allies, and can accrue only within their territory, or as between them. It cannot be enforced in neutral states, because the neutral is bound to consider each belligerent as equally just in his position.

"In the wars from which Holland suffered so severely during the latter part of the last and the beginning of the present centuries, the United States were neutral. It would be an extension of the doctrine which you invoke beyond any authority which I can find to apply it to a power which had maintained the position which the United States observed toward Holland and France during the long contest. I fail to find it anywhere stated that on the conclusion of a peace by which a conquered country has regained her independence, the ancient treaties of that country with other powers are thereby necessarily revived. Indeed, the course pursued by Holland and Denmark in the treaty of July 10, 1817, whereby the parties agreed that the stipulations of the treaty of commerce between them of 1701 should remain in force until there should be an arrangement for its renewal, would seem to show that in their joint judgment such was not the public law in 1817.

"Happily, however, the unmistakable accord of the United States and Holland, respecting the treaty of 1782, renders further discussion of this point unnecessary.

"Upon the pacification of Western Europe in 1815, and the creation of the Kingdom of the Netherlands, the United States, finding their commercial treaties with the states in Europe which had been at war at an end, provided by legislation to meet the necessities of the case, and for the establishment of reciprocal freedom of commercial intercourse with those states. By an act passed on the 3d day of March, 1815, they abolished all discriminating duties on vessels and on goods, the produce or manufacture of any foreign nation, imported into the United States in the vessels of those foreign nations which might abolish discriminating or countervailing duties to the disadvantage of the United States.

"This act subsequently became the subject of some correspondence between the two Governments. A negotiation was carried on at The Hague, in which both parties endeavored to agree upon a new treaty, with the old treaty of 1782 as the basis; but it failed from causes which it is not necessary to dwell upon. It is worthy of note in this connec-

tion that after the objections to the Dutch contention concerning the treaty of 1782 had been withdrawn in 1820, Mr. Adams, referring to these unsuccessful negotiations, instructed Mr. Everett (August 9, 1823) that 'the act of 1815 was an experimental offer, made to all maritime nations. It was in the course of the same year accepted by Great Britain, confirmed in the form of a convention. A similar effort was made with the Netherlands in 1817, but without success; *but the principle of equalization was established by corresponding legislative acts.*'

"It is evident from this that the officers of the United States had reason to think that the commercial relations of the two countries at that time were regulated not by treaty, but by reciprocal legislation, and that the United States desired to have the basis of that legislation the principle of equalization. Indeed, as early as the 5th of March, 1818, Mr. Adams informed Mr. Ten Cate that 'notwithstanding the termination of the conferences between the plenipotentiaries of the two Governments without succeeding in the object of their meeting by the conclusion of a new treaty of commerce between the two nations, the desire of the Government of the United States is not the less earnest that the commercial intercourse between them may be regulated by principles of perfect reciprocity, and tending to promote the most cordial harmony and friendship between them.'

"Reciprocity and equalization to be achieved by legislation, were at that time the American solution of perfect commercial relations between the two nations.

"I am not aware that any Dutch official took exceptions to this plan, or asserted that the treaty of 1782 was in force with the 'most favored nations' plan as its basis. Even Mr. Chevalier Baugeman Huygens, in his note of November 11, 1826, quoted by you, asserts that the provisions of the treaty were 'suspended' (Baron de Nazel claimed that the suspension lasted eighteen years), and the whole tenor of Mr. Huygens's note shows that he felt that there was no mutual act of the two Governments by which it could be shown that the suspension was set aside and the treaty revived. Else why does he speak in his note of 'the existence or *the renewal of the treaty of* 1782,' and why does he say that 'it would certainly be more advantageous to the two nations to leave *that precarious legislation and be bound by liberal and reciprocal conventions*?'

"In 1839 the parties left 'precarious legislation' and became 'bound by a liberal and reciprocal convention.' In this instrument, which is declared to be made because the parties are anxious to regulate the commerce and navigation carried on between the two countries in their respective vessels, it is provided that goods and merchandise of whatever origin, imported into or exported from the ports of one country from or to the ports of the other (those of the Netherlands being confined to Europe), shall pay no higher or other duties than those levied on like goods and merchandise imported or exported in national vessels;

that bounties, drawbacks, or other favors in either state on goods exported or imported in national vessels shall be also granted on goods directly exported or imported in vessels of the other country to and from the ports of the two countries; and that tonnage and harbor dues, and light-house, salvage, pilotage, quarantine, or port charges shall be imposed in each country on the vessels of the other only as imposed in like cases on national vessels.

"Again, in 1852, the two powers '*being desirous of placing the commerce of the two countries on a footing of greater mutual equality*,' agreed to extend the provisions of the treaty of 1839, so that its provisions should include also goods and merchandise of whatever origin, imported or exported from or to any other country than the United States or Netherlands respectively, with a similar extension as to bounties, drawbacks, &c.; so that now, by treaty as well as by legislation, the commerce and trade of each of the two countries are placed upon that footing of equality with those of the other, and upon that basis of complete reciprocity, which both parties have ever professed to desire, and which the United States sought to attain by reciprocal and equalizing legislation. It is worthy of remark that the negotiators of the treaty of 1782 declare that it is concluded with the object of 'establishing *the most perfect equality* and reciprocity for the basis of their agreement,' while the negotiators of the treaty of 1852 declare that the two powers were then desirous of placing the two countries on a footing of *greater mutual equality*. If the treaty of 1782, creating 'the most perfect equality,' was in force in 1852, why should the parties have thought it necessary to provide for an equality greater than the most perfect one already existing? To ask such a question is to suggest the answer.

"It was because the treaty of 1782 had long ceased to be operative, and because the mutual commercial relations of the two powers which each desired to increase, and to remove from the influence of fluctuating legislation, demanded further protection, that the parties concluded the successive treaties of 1839 and 1852. And in these instruments, influenced by the liberal views which now prevail, the parties agreed to measure the equality and the reciprocity which they desired to give each to the other, not by the favors which they might grant to any other, even the most favored nation, but by the impositions to which the national vessels of each were subjected in its own ports. It seems to me that an agreement which goes beyond this just measure, and which aims to give to the vessel under the foreign flag a preference over a vessel which carries the national ensign, is founded in injustice, and when enforced can only tend to decrease the friendliness and cordiality which commercial treaties should aim to foster. Happily no such engagement exists between the United States and the Netherlands.

"The laws of the United States impose a tonnage tax of thirty cents per ton on the first entry or clearance, according to priority of a vessel from or to the West India Islands, the British provinces of North

America, Mexico, or any port or place south of Mexico, down to and including Aspinwall and Panama, or any port or place in the Sandwich Islands, or the Society Islands, provided that no tonnage tax has been paid on such vessels within one year. They also impose a tax of the same amount on vessels engaged in commerce between the United States and foreign ports or places other than those specified above, to be levied on the first entry, and thereafter on each entry made after the expiration of a year from any previous payment of the dues.

"All vessels of the commercial marine of the United States are subject to and pay this tax. The commercial marine of Holland, being placed by treaty on the same footing with the commercial marine of the United States, is subject to no other or higher duties than these, but is subject to these tonnage dues so long as they shall continue to be imposed by law upon the vessels of the United States.

"If, as I flatter myself has been shown, the treaty of 1782 is no longer binding on the parties, their commercial relations are now regulated by the treaties of 1839 and 1852 only. Neither of these instruments, however, promises to place the vessels of Holland in the ports of the United States on the same footing as those of the most favored nation. When they were concluded, Holland probably supposed that she had a sufficient security against any discrimination in the stipulation that her vessels were to have the same treatment in our ports as our own. At that time no tonnage duties were levied in the ports of the United States. Events have since occurred, however, which, in the judgment of Congress, made such a change necessary."

Mr. Fish, Sec. of State, to Mr. De Westenberg, Apr. 9, 1873. MSS. Notes, Netherlands. For. Rel., 1873. On this topic see Mr. J. C. B. Davis, in "Notes to Treaties," tit., Netherlands, 1782. See, also, *infra*, § 155.

A successful revolution does not relieve the country revolutionized from liability on its prior engagements to foreign states.

Mr. Fish, Sec. of State, to Mr. Bassett, Feb. 21, 1877, MSS Inst., Hayti.
As to effect of revolutions on claims, see *infra*, §§ 236, 240; App., vol. iii, § 5.

IX. *ABROGATION BY CONSENT, BY REPUDIATION, OR BY CHANGE OF CIRCUMSTANCES.*

§ 137a.

A treaty may be modified or abrogated under the following circumstances:

(1) When the parties mutually consent.
(2) When continuance is conditioned upon terms which no longer exist.
(3) When either party refuses to perform a material stipulation.
(4) When all the material stipulations have been performed.
(5) When a party having the option elects to withdraw.
(6) When performance becomes physically or morally impossible.

(7) When a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists.

In most of the old treaties were inserted the "*clausula rebus sic stantibus*," by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect it is not necessary that the facts alleged to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation.

The maxim, "*Conventio omnis intelligitur rebus sic stantibus*," is held to apply to all cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice.

Whart. Com. Am. Law, § 161. See *infra*, § 138.

"The first point to be determined in this inquiry, is, as you properly suggest, whether the treaty of March 20, 1833 [with Siam], is superseded by the subsequent treaty of May 29, 1856. As a general rule, as you are well aware, unless a particular contract undertakes to abrogate all former contracts between the parties, it only vacates such portions of former contracts as are inconsistent with its terms. The same rule is applied to statutes covering more or less the ground of former legislation. If this rule be applied in the present case, then the clause in the treaty of 1833 precluding the importation or sale in Siam (except to the King) of 'munitions of war' is still in force."

Mr. Bayard, Sec. of State, to Mr. Phelps, Jan. 7, 1886. MSS. Inst., Gr. Brit.

"The Duke (of Wellington, then prime minister) has left a memorandum on the cabinet table showing clearly from treaties that this (the overthrow of the Bourbons in 1830) is not a case in which we were bound to interfere. We engaged to support a constitutional monarch against revolutionary movements, but the monarch having violated the constitution has broken the condition."

2 Lord Ellenborough's Diary, &c., 341, entry of Aug. 23, 1830. But see *supra*, § 137.

The intention to abrogate a treaty must plainly appear.

Chin A. On, *in re;* 18 Fed. Rep., 506.

As to abrogation by subsequent legislation, see *infra*, §§ 138, 248.

The question of the abrogation of the treaties with France, of 1778, is considered *infra*, §§ 148, 248. At present the following notes may be sufficient to exhibit the points at issue:

The act "annulling" the treaties is as follows:

"Whereas the treaties concluded between the United States and France have been repeatedly violated on the part of the French Government, and the just claims of the United States for reparation of the injuries so committed have been refused, and their attempts to negotiate an amicable adjustment of all complaints between the two nations have been repelled with indignity; and whereas, under authority of the French Government, there is yet pursued against the United States a system of predatory violence, infracting the said treaties and hostile to the rights of a free and independent nation:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the United States are of

right freed and exonerated from the stipulations of the treaty and of the consular convention heretofore concluded between the United States and France, and that the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States.

"Approved July 7, 1798."

1 U. S. Stat. L., 578.

This annulling act, however, whatever might be its municipal effect, by itself could not internationally release the United States from its obligations toFrance. *Supra*, § 9 (last clause).

In Chirac *v.* Chirac, 2 Wheat., 272, Marshall, C. J., said that there was in July, 1799, "no treaty in existence between the two nations." This, however, applies merely to the municipal operations of the treaty.

The act of Congress was sustained by the American envoys, in a letter to the French envoys, dated at Paris, July 23, 1800, on the ground of prior violation by France. (*Infra*, § 248.) "It was remarked that a treaty, being a mutual compact, a palpable violation of it by one party did, by the law of nature and of nations, leave it optional with the other to renounce and declare the same to be no longer obligatory; and that, of necessity, there being no common tribunal to which they could appeal, the remaining party must decide whether there had been such violation on the other part as to justify its renunciation. For a wrong decision it would doubtless be responsible to the injured party, and might give cause for war; but even in such case its act of public renunciation, being an act within its competence, would not be a void, but a valid act, and other nations whose rights might thereby be beneficially affected would so regard it.

"That it had become impossible for the United States to save their commerce from the depredations of French cruisers but by resorting to defensive measures; and that as, by their Constitution, existing treaties were the supreme law of the land, and the judicial department, who must be governed by them, is not under the control of the executive or legislative, it was also impossible for them to legalize defensive measures, incompatible with the French treaties while they continued to exist. Then it was that they were formally renounced. * * *

"To the still further suggestion that the laws of nations admitted of a dissolution of treaties only by mutual consent or war, it was remarked by the undersigned that their conviction was clearly otherwise, and that Vattel in particular, the best approved of modern writers, not only held that a treaty violated by one party might, for that reason, be renounced by the other, but that where there were two treaties between the same parties, one might be rendered void in that way, and the other remain in force; whereas when war dissolves, it dissolves all treaties between the parties at the time."

Messrs. Ellsworth, Davie, and Murray to the French negotiators, July 23, 1800, Sen. Ex. Doc. 102, 19th Cong., 1st sess, pp. 612, 613. See *infra*, § 148.

"At the close of the wars of Napoleon, the treaty of 1795 with Spain alone, of all of the commercial treaties, survived. President Madison contemplated using the opportunity to mould all the treaties of this nature into a general system. Mr. Monroe, in an early stage of negotiations with Holland, for this purpose, informed the Dutch minister at Washington that 'the treaties between the United States and some of the powers of Europe having been annulled by causes proceeding from the state of Europe for some time past, and other treaties having ex-

pired, the United States have now to form their system of commercial intercourse with every power, as it were, at the same time.' But the only general commercial treaties which Monroe succeeded in concluding, either as Secretary of State under President Madison, or as President with John Quincy Adams as Secretary of State, were the treaty of 1815 with Great Britain, the limited arrangements made with France in 1822, and the treaty with Colombia in 1824."

Mr. J. C. B. Davis, Notes, &c. See *infra*, § 161.

The treaty of Paris, assented to by the congress of Vienna (1814–'15), consolidated Holland and Belgium. In 1830 the five powers, who were parties to the treaty of Vienna, determined (December 20, 1830) that "in forming, by the treaties in question, the union of Belgium and Holland, the powers who signed those treaties had in view the establishment of a just equilibrium in Europe, and the assurance of the maintenance of general peace. Unhappily the events of the last few months have shown that the full and complete amalgamation which the powers desired to produce in those countries has not been obtained; that it would henceforth be impossible to effectuate that purpose; that thus the very object of the union of Belgium and Holland was destroyed, and that henceforth it becomes indispensable to recur to other arrangements in order to accomplish the intention, the means of executing which this union ought to serve."

Abdy's Kent (1878), 52; citing Brit. and For. St. Pap., 1830–'31, vol. 19, p. 749.

"History is full of broken guarantees and alliances, and of disputes about the *casus fœderis*, which have not arisen from bad faith, nor from the common uncertainties of language, but are peculiar to this class of compacts, and against which no precision of phrase can ever completely join. Multiply engagements as you will; clinch them firmly as you may; but never count on them to make a nation draw sword in a quarrel it deems unjust, and for objects in which it is to have no share. The successive coalitions against the first Napoleon showed how hard a task it is to induce several powers to act steadily together, even in the presence of a general, instant, and formidable danger."

Bernard on Diplomacy, 85.

"In 1814 and 1815 a set of treaties were made by a general congress of the states of Europe, which affected to regulate the external, and some of the internal, concerns of the European nations, for a time altogether unlimited. These treaties, having been concluded at the termination of a long war, which had ended in the signal discomfiture of one side, were imposed by some of the contracting parties, and reluctantly submitted to by others. Their terms were regulated by the interests and relative strength at the time of the victors and vanquished, and were observed as long as those interests and that relative strength remained the same. But as fast as any alteration took place in these elements, the powers, one after another, without asking leave, threw off, and were allowed with impunity to throw off, such of the obligations of the treaties as were distasteful to them, and not sufficiently important to the others to be worth a fight. The general opinion sustained some of those violations as being perfectly right; and even those which were disapproved were not regarded as justifying a resort to war. Europe did not interpose when Russia annihilated Poland, when

Prussia, Austria, and Russia extinguished the Republic of Cracow, or when a second Bonaparte mounted the throne of France. * * *

"Did any impartial person blame Prussia or Austria because, in 1813, they violated the treaties which bound them to the first Napoleon, and not only did not fight in his ranks, as their engagements required, but brought their whole military force into the field against him, and pursued him to his destruction? Ought they, instead of canceling the treaties, to have opened a negotiation with Napoleon, and entreated him to grant them a voluntary release from their obligations, and if he did not comply with their request to be allowed to desert him, ought they to have faithfully fought in his defense? Yet it was as true of those treaties as it is of the treaty of 1856, that, disadvantageous and dishonorable as they might be, they had been submitted to as the purchase-money of peace, when the prolongation of war would have been most disastrous; for had the terms been refused, Napoleon could with ease have conquered the whole of Prussia and, at least, the German dominions of Austria, which is considerably more, I presume, than England and France could have done to Russia after the fall of Sebastopol. * * *

"What means, then, are there of reconciling, in the greatest practicable degree, the inviolability of treaties and the sanctity of national faith, with the undoubted fact that treaties are not always fit to be kept, while yet those who have imposed them upon others weaker than themselves are not likely, if they retain confidence in their own strength, to grant a release from them? To effect this reconcilement, so far as it is capable of being effected, nations should be willing to abide by two rules. They should abstain from imposing conditions which, on any just and reasonable view of human affairs, cannot be expected to be kept. And they should conclude their treaties as commercial treaties are usually concluded, only for a term of years. * * *

"If these principles are sound it remains to be considered how they are to be applied to past treaties, which, though containing stipulations which, to be legitimate, must be temporary, have been concluded without such limitation, and are afterwards violated, or, as by Russia at present, repudiated, on the assumption of a right superior to the faith of engagements.

"It is the misfortune of such stipulations, even if as temporary arrangements they might have been justifiable, that if concluded for permanency they are seldom to be got rid of without some lawless act on the part of the nation bound by them. If a lawless act, then, has been committed in the present instance, it does not entitle those who imposed the conditions to consider the lawlessness only, and to dismiss the more important consideration, whether, even if it was wrong to throw off the obligation, it would not be still more wrong to persist in enforcing it. If, though not fit to be perpetual, it has been imposed in perpetuity, the question when it becomes right to throw it off is but a question of time. No time having been fixed, Russia fixed her own time, and naturally chose the most convenient. She had no reason to believe that the release she sought would be voluntarily granted on any conditions which she would accept, and she chose an opportunity which, if not seized, might have been long before it occurred again, when the other contracting parties were in a more than usually disadvantageous position for going to war."

J. S. Mill on "Treaty Obligations," 8 Fortnightly Review, N.S. (1870), 715 *ff.*

The following is a memorandum of abrogated treaties of the United States (not including claims conventions).

ALGIERS:

The treaties with Algiers are regarded as terminated by the French conquest of 1831.

BELGIUM:

1845, November 10. Commerce and navigation. Terminated August 20, 1858, in accordance with Article XIX, by notice given by Belgium in note of August 20, 1857.

1858, July 17. Commerce and navigation. Terminated July 1, 1875, by notice given by the United States July 1, 1874, in accordance with the joint resolution of Congress approved June 17, 1874.

1868, December 5. Consular. Terminated January 1, 1880, in accordance with Article XVI, by notice given by Belgium January 1, 1879.

1868, December 20. Trade-marks. Terminated July 1, 1875, with the treaty of July 17, 1858, of which it formed part.

1874, March 19. Extradition. Terminated December 18, 1882, in accordance with Article XI of convention of June 13, 1882.

BRAZIL (see *infra*, § 143).

1828, December 12. Commerce and navigation. Terminated December 12, 1841, by notice given by Brazil March 26, 1840.

CENTRAL AMERICA:

1825, December 5. Commerce and navigation. Terminated as respects commerce and navigation by its own limitation August 2, 1838, and for the rest by the dissolution of the federation in 1839.

CHILI:

1832, May 18. Commerce and navigation. Terminated January 20, 1850, by notice given by Chili January 19, 1849, in accordance with Article XXXI.

1833, September 1. Additional to, and explanatory of, the treaty of 1832. Terminated January 20, 1850, with the treaty of May 18, 1832, of which it formed part.

CHINA (see *infra*, § 144):

1844, July 3. Amity and commerce. The treaties of June 18 and November 8 1858, take its place.

COLOMBIA (see *infra* § 145):

1824, October 3. Commerce and navigation. Terminated October 3, 1836, by its own limitation.

FRANCE (see *infra*, §§ 148 *ff*):

1778, February 6. Amity and commerce. Terminated by act of Congress approved July 7, 1798. (But see discussion *supra* in this section, and *infra*, §§ 148, 248.)

1778, February 6. Alliance. Terminated as above. (*Ibid.*)

1778, February 6. (Act separate and secret.) Terminated as above. (*Ibid.*)

1788, November 14. Consular. Terminated as above. (*Ibid.*)

1800, September 30. Commerce and navigation. Terminated July 31, 1809, by its own limitation.

GREAT BRITAIN (see *infra*, §§ 150 *ff*):

1782, November 30, Peace; 1783, September 3, Commerce and navigation; 1794, November 19, Commerce and navigation; 1797, May 4, Explanatory; 1798, March 15, Explanatory; 1802, January 8, Claims. Held by Great Britain to have been terminated by war of 1812. (But as to this, see *supra*, § 135.)

1827, September 29. Boundary. Treaty of 1842 substituted.

1854, June 5. Reciprocity. Terminated March 17, 1866, by notice given by the United States March 17, 1865, in accordance with the joint resolution of Congress approved January 18, 1865.

GREAT BRITAIN—Continued.

1862, April 7. Slave trade. Right of search and detention therein given extended to vicinity of certain islands, February 17, 1863. Provisions as to mixed tribunals abolished August 10, 1870. Instructions for the ships employed to prevent the African slave trade modified by convention of June 3, 1870.

1871, May 8. Alabama claims. Articles 18 to 25 inclusive, and article 32, relating to the fisheries, and article 30, respecting the transportation of merchandise terminated July 1, 1885, by notice given by the United States July 2, 1883, in accordance with the joint resolution of Congress approved March 3, 1883.

GUATEMALA:

1849, March 3. Terminated November 4, 1874.

HANOVER:

All the treaties with Hanover are regarded as having terminated in consequence of its incorporation into the Kingdom of Prussia in 1866.

ITALY (see *infra*, § 152):

1868, February 8. Consular. Terminated September 17, 1878, by notice given by Italy, September 15, 1880.

JAPAN (see *infra*), § 153):

1854, March 31. Such of the provisions of this treaty as conflict with those of the treaty of July 29, 1858, are revoked by the twelfth article of the latter treaty.

1857, June 17. Terminated by Article XII of the treaty of July 29, 1858.

1864, January 28. Commerce. Terminated July 1, 1866, by convention of July 25, 1866.

MEXICO (see *infra*, § 154):

1828, January 12. Never carried into operation.

1831, April 5. Suspended by war between the parties in 1846–1847; revived May 30, 1848, with some exception, by article 17 of the treaty of February 2, 1848; article 33 abrogated by article 2 of the treaty of December 30, 1853; and the entire treaty finally terminated November 30, 1881, by notice given by Mexico November 30, 1880.

1868, July 10. Terminated February 11, 1882, by notice given by Mexico February 10, 1881.

MOROCCO:

1787, January. Terminated January, 1837, by its own limitation.

NASSAU:

1846, May 27. Nassau was absorbed into the Kingdom of Prussia in 1846, and all treaties with it are regarded as terminated.

NETHERLANDS (see *infra*, § 155):

1782. (See Mr. Fish to Mr. De Westenberg, April 9, 1873, quoted *supra*, § 137.)

1855, January 22. Consular. Terminated August 20, 1879; the convention of May 23, 1878, took its place.

PERU:

1836. (See *infra*, § 157.)

1851, July 26. Terminated December 9, 1863, by notice given by Peru December 9, 1862.

1870, September 6. Commerce and navigation. Terminated March 31, 1886, by notice given by Peru March 31, 1885.

1870, September 12. Extradition. Terminated as above.

PRUSSIA (see *infra*, § 149):

1785, September 10. Amity and commerce. Terminated October, 1796, by its own limitation.

1799, July 11. Amity and commerce. Terminated June 22, 1810, by its own limitation.

SALVADOR:

1850, January 2. Commerce and navigation. Abrogated by article 38 of treaty of December 6, 1870.

SARDINIA (see *infra*, § 160):

1838, November 26. Commerce and navigation and separate article. Treaty of 1871 with Italy takes its place.

SPAIN (see *infra*, §§ 161 *ff.*):

1802, August 11. Claims. Annulled by article 10 of treaty of February 22, 1819.

SWEDEN AND NORWAY:

1816, September 4. Terminated by its own terms.

TRIPOLI (see *infra*, § 164):

1796, November 4. Treaty of June 4, 1805, takes its place.

TURKEY:

(See *infra*, § 165.)

TWO SICILIES (see *infra*, § 152):

1845, December 1. Commerce and navigation. Treaty of 1855 takes its place.

1855, January 13. Neutral rights. Terminated by absorption of the Two Sicilies by Italy.

1855, October 1. Commerce and navigation and extradition. Terminated by absorption of the Two Sicilies by Italy.

VENEZUELA (see *infra*, § 165*a*):

1836, January 20. Commerce and navigation. Terminated January 3, 1851, by notice given by Venezuela in note of November 5, 1849, received January 3, 1850.

1860, August 27. Commerce and navigation and extradition. Terminated October 22, 1870, by notice given by Venezuela October 22, 1869.

X. *TREATIES, WHEN CONSTITUTIONAL, ARE THE SUPREME LAW OF THE LAND, BUT MAY BE MUNICIPALLY MODIFIED BY SUBSEQUENT LEGISLATION*

§ 138.

"Treaties, as I understand the Constitution, are made *supreme* over the constitutions and laws of the particular States, and, like a subsequent law of the United States, over pre-existing laws of the United States; provided, however, that the treaty be within the prerogative of making treaties, which, no doubt, has certain limits.

"That the contracting powers can annul the treaty cannot, I presume, be questioned, the same authority, precisely, being exercised in annulling as in making a treaty.

"That a breach on one side (even of a single article, each being considered as a condition of every other article) discharges the other, is as little questionable, but with this reservation, that the other side is at liberty to take advantage or not of the breach, as dissolving the treaty. Hence I infer that the treaty with Great Britain, which has not been annulled by mutual consent, must be regarded as in full force by all on whom its execution in the United States depends, until it shall be de-

clared by the party, to whom a right has accrued by the breach of the other party to declare, that advantage is to be taken of the breach, and the treaty is annulled accordingly. In case it should be advisable to take advantage of the adverse breach, a question may perhaps be started, whether the power vested by the Constitution with respect to treaties in the President and Senate makes them the competent judges, or whether, as the treaty is a law, the whole legislature are to judge of its annulment, or whether, in case the President and Senate be competent in ordinary treaties, the legislative authority be requisite to annul a *treaty of peace*, as being equivalent to a declaration of war, to which that authority alone, by our Constitution, is competent."

Mr. Madison to Mr. Edmund Pendleton, Jan. 2, 1791. 1 Madison's Work's, 524. See Mr. Jefferson's views, *supra*, § 131.

"I delivered to the President my report of instructions for Carmichael and Short on the subject of navigation, boundary, and commerce, and desired him to submit it to Hamilton. Hamilton made several just criticisms on different parts of it. But where I asserted that the United States had no right to alienate an inch of the territory of any State, he attacked and denied the doctrine. See my report, his note, and my answer."

Extract from Jefferson's Ana, March 11, 1792. 2 Randall's Life of Jefferson, 55. For views of Hamilton and King, see 5 Lodge's Hamilton, 134, 310.

"In every constitutional Government the power of raising and granting money is vested in the legislature; that of making treaties in the executive. In every such Government the question may arise whether the treaty-making power is, in every instance, paramount, and imposes on the legislature the duty of granting without examination the money necessary to pay the subsidies or indemnities promised by the treaty; or, whether the *power* of granting money, vested by the constitution in that body, does not necessarily imply the *right* of examining and deciding each case according to its original merits.

"The present Administration of the United States is of opinion that here the treaty-making power is paramount. It may thence have been too hastily inferred that that power was in France also acknowledged to be supreme and to pledge absolutely the legislature and the nation. There may be in the Constitution of the United States some clauses not to be found in that of France, which sustain the construction adopted by our Executive Magistrate. But even in the United States the question has been considered as doubtful.

"Mr. Madison's resolution of the year 1796, which asserts the abstract right of the House of Representatives, was adopted by a majority of the House, and remains, unrepealed, of record on its journal. And it cannot be denied that, during the sixteen years of the administration of Presidents Jefferson and Madison, that was the avowed construction of the Constitution by the Government of the United States. It is not necessary here to inquire whether that construction is correct. I may not be an impartial judge of that question, and only mean to show that even here, it is one on which opinions have been divided."

Mr. Gallatin to Mr. Everett, January, 1835. 2 Gallatin's Writings, 479.

"The non-compliance with the conditions of a treaty, whether proceeding from the executive or legislative branch of Government, does not alone, and when neither arising from a hostile spirit nor accompanied

with insult, afford such extreme ground of complaint as to impose on the aggrieved nation the necessity of considering that act as an indignity, and of resorting to war as the only alternative for sustaining her character. The refusal of the British House of Commons to carry into effect the commercial treaty of Utrecht with France has already been alluded to. I beg leave to remind you of another instance:

"By the treaty of 1794, between America and England, the United States bound themselves to pay to British subjects the amount of the British debts which had been lost by reason of laws passed by several States in contravention of the provisions of the treaty of 1783. And it was expressly provided by that of 1794 that the amount thus payable by the United States should be definitely settled by a joint commission consisting of four members, and, in case of disagreement between these, by a fifth commissioner, chosen by the four primitive members of the board."

Mr. Gallatin to Mr. Everett, January, 1835. 2 Gallatin's Writings, 497. See 6 Jeff. Works, 557, for a memorandum of Mr. Jefferson, dated Mar. 13, 1816, as to the power of a treaty to modify a pre-existing law.

"By the Federal Constitution the several States retained all the attributes of sovereignty which were not granted to the General Government. The right of regulating successions in relation to the subject in question is not among those conceded rights; consequently it was reserved to, and is still vested in, the several States. But by the same Constitution it is provided that treaties made under the authority of the General Government shall be the supreme law of the land, anything in the constitution or laws of a State to the contrary notwithstanding.

"This very brief exposition shows at once the cause of the want of comity in the laws of the United States to which you advert, and indicates the remedy which a treaty between the two nations would effectually apply."

Mr. Livingston, Sec. of State, to Mr. de Sacken, June 13, 1831. MSS. Notes, For. Leg.

"The Government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the Government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations."

Mr. Livingston, Sec. of State, to Mr. Serurier, June 3, 1833. MSS. Notes. For. Leg. See also Mr. McLane, Sec. of State, to Mr. Serurier, Sept. 5, 1833; *ibid.* But see supra § 131*a*.

"From the beginning and throughout the whole existence of the Federal Government, it [the treaty-making power] has been exercised constantly on commerce, navigation, and other delegated powers, to the almost entire exclusion of the reserved, which, from their nature, rarely ever come in question between us and other nations. The treaty-making

power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers. So far, indeed, is it from being true, as the report supposes, that the mere fact of a power being delegated to Congress excludes it from being the subject of treaty stipulations, that even its exclusive delegation, if we may judge from the habitual practice of the Government, does not—of which the power of appropriating money affords a striking example. It is expressly and exclusively delegated to Congress, and yet scarcely a treaty has been made of any importance which does not stipulate for the payment of money. No objection has ever been made on this account. The only question ever raised in reference to it is, whether Congress has not unlimited discretion to grant or withhold the appropriation."

Mr. Calhoun, Sec. of State, to Mr. Wheaton, June 28, 1844. MSS. Inst., Prussia.

"The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this proposition."

Mr. Marcy, Sec. of State, to Mr. Mason, Sept. 11, 1854. MSS. Inst., France.

"In reply, the undersigned hastens to inform Mr. Aspurúa that it is believed not to be competent to the treaty-making power of the United States to enter into such an engagement as that contained in the twenty-fifth article of the convention concluded at Caracas on the 20th day of September by the plenipotentiaries of Venezuela and the United States, viz:

"'Whenever one of the contracting parties shall be engaged in war with another state, no citizen of the other contracting party shall accept a commission or letter of marque for the purpose of assisting or co-operating hostilely with the said enemy against the said party so at war, under the pain of being considered as a pirate.'

"The Constitution of the United States provides that Congress shall 'define and punish piracies and felonies committed on the high seas.' Although several conventions have been made by this Government with foreign Governments, some of which still continue in force, containing, in substance, the stipulation just quoted, they were evidently contracted by an oversight of one of the provisions of the Constitution—the supreme law of this country. The President, entertaining this opinion, cannot consent to transmit the convention negotiated by Mr. Eames, which in all other respects meets with his approval, to the Senate for ratification without presenting to that body his objections to the article aforementioned."

Mr. Marcy, Sec. of State, to Mr. Aspurúa, Nov. 15, 1854. MSS. Notes, Venez.

"It is not, as you will perceive by examining Mr. Drouyn de L'Huys's dispatch to the Count de Sartiges, the application of the 'principle' to the particular case of M. Dillon which is to be disavowed, but the broad and general proposition that the Constitution is paramount in authority to any treaty or convention made by this Government. This principle, the President directs me to say, he cannot disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law."

Mr. Marcy, Sec. of State, to Mr. Mason, Jan. 18, 1855. MSS. Inst., France.

"A mere declaration by a congress of the representatives of a few powers would hardly be a proper instrument to send to the Senate for ratification. If it came from each Government in an authentic form the difficulty might perhaps in that way be got over. Then it would assume the character of a contract, and a treaty is nothing more. I do not see that the provisions of the declaration of the Paris conference, amended as this Government has proposed, could embarrass the Government of the Emperor of the French in the way you apprehend. The amendment does not require France to go aside from the declaration; it goes a little beyond that declaration, but precisely in the same direction. The proposed treaty would contain all of the declaration. The engagement of the Imperial Government, with the other signatory powers, is not to negotiate on maritime rights without embracing the principles of the declaration, and that engagement would not in the slightest degree be departed from by the proposed treaty."

Mr. Marcy, Sec. of State, to Mr. Mason, Dec. 8, 1856. MSS. Inst., France.

"The estates of decedents are administered upon and settled in the United States under the laws of the State of which the decedent was a resident at the time of his death, and on this account, in the absence of any treaty regulations on the subject, interference in the disposition of such measures as may be prescribed by the laws of the particular State in such cases is not within the province of the Federal authorities."

Mr. Fish, Sec. of State, to Aristarchi Bey, May 19, 1874. MSS. Notes, Turkey.

"Provisions of treaties and of statutes are made by the Constitution alike the supreme law of the land, and such law remains in full force and equally binding until repealed, abrogated, or set aside by competent authority.

"But it is difficult to deduce from the Constitution or elsewhere any standard by which to measure the relative weight to be accorded to law, when made by the negotiation of a treaty, over that made by enacting a statute.

"It has been held quite frequently that a subsequent treaty supersedes an act of Congress with which it is in conflict, as in Ware *v.* Hylton, 3 Dall., 199; Dean *ex dem.* Fisher *v.* Harnden, 1 Paine C. C., 55; and the converse that an act of Congress subsequent to a treaty must be enforced as the supreme law of the land, although in violation of the provisions of the treaty, has been held quite frequently. (Taylor *v.* Morton, 2 Curtis C. C., 454; Ropes *v.* Clinch, 8 Blatch, 304; The Clinton Bridge, 1 Woolworth, 150; The Cherokee Tobacco Cases, 11 Wall., 616.)

"You consider the decision in the Cherokee tobacco cases, however, *obiter*, because the treaty was an Indian treaty. Still the general question was distinctly passed on by the court, and no such question was there raised, and it has been decided on legal authority that a treaty with Indian tribes has the same dignity and effect as a treaty with a foreign power, being a treaty within the meaning of the Constitution, and the supreme law of the land. (Turner *v.* The American Baptist Missionary Union, 5 McL. C. C., 344.)

"Mr. Crittenden, while Attorney-General, held, in reference to the Florida claims, that 'an act of Congress is as much a supreme law of the land as a treaty. They are placed on the same footing, and no preference or superiority is given to the one over the other.' (5 Op. Att. Gen., 345.)

"In the general discussion of the question in the early cases, such as the United States *v.* The Schooner Peggy, 1 Cranch, 103, and Foster *v.* Neilson, 2 Pet., 253, a treaty is considered as equivalent, not superior, to an act of Congress.

"Judge Story, too, declares that treaties are subject to legislative enactment; and Judge Cooley, in his edition, and in a note to Judge Story's text, states the rule very broadly that an act of Congress may supersede a prior treaty.

"In a strict legal sense the difficulty lies in considering law, when enacted, regardless of the method of enactment, as other than binding in the highest degree.

"Of course, in speaking of the effect of subsequent legislation upon the provisions of a prior treaty, I refer only to the effect in the country where the legislation is enacted, and upon the officers and people of that country.

"The foreign nation whose rights are invaded thereby has no less cause of complaint and no less right to decline to recognize any internal legislation which presumes to limit or curtail rights accorded by treaty."

Mr. Fish, Sec. of State, to Mr. Cushing, July 20, 1876. MSS. Inst., Spain. See *supra*, § 9.

"The result of several late decisions in this country, as well as two at least of the opinions of the Attorneys-General, seem to lead to the

conclusion that an act of Congress of later date than a treaty, although in violation of its terms, must be obeyed as municipal law within the country, although in no manner binding on the foreign state, and although it in no manner affords a sufficient excuse for a violation of treaty provisions."

Mr. Fish, Sec. of State, to Mr. Cushing, Feb. 13, 1877; adopting same to same, July 20, 1876. MSS. Inst., Spain. See *supra*, § 9.

"This is not a case where domestic laws override the provisions of a treaty, but where a treaty depends on domestic laws to give it effect; and those domestic laws, and the judgment interpreting them, must of necessity be the sole guidance of the Executive in its execution. Although a foreign treaty is, by the Constitution of the United States, in like manner with acts of Congress and the Constitution, the supreme law of the land, yet generally it does not execute itself, but requires some legislation, especially under a republican form of government, to carry it into effect. Chief-Justice Marshall clearly explains the rule as to the relation between treaty and statutory law, when he says that a treaty 'is to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court.'"

Mr. F. W. Seward, Acting Sec. of State, to Mr. Mendez, June 28, 1879. MSS. Notes, Spain.

A treaty, if within the treaty-making power, overrides State legislation.

Ware *v.* Hylton, 3 Dall., 199; Fisher *v.* Harnden, 1 Paine, 55; Hauenstein *v.* Lynham, 100 U. S., 483.

The execution of a treaty between nations is to be demanded from, and, in general, superintended by, the executive of each nation, and, therefore, whatever the decision of the court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court as an act of Congress; and, although restoration may be an executive act, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and consequently improper.

U. S. *v.* The Peggy, 1 Cranch, 109.

The convention of 1800, between France and the United States, enabling the people of one country holding lands in the other to dispose

of the same by testament, and to inherit lands in the other, without being naturalized, has been held to dispense with limitations in a state statute on the alien inheritance.

Chirac *v.* Chirac, 2 Wheat., 259.

The expiration of the treaty does not divest rights acquired under it.

Ibid; see *infra*, § 148*a*.

Since by the Constitution treaties made in pursuance thereof are to be the law of the land, they are to be regarded by the courts as equivalent to a legislative act when they operate directly upon a subject; but if they merely stipulate for future legislation by Congress, they address themselves to the political and not to the judicial department, and the latter must await the action of the former.

Foster *v.* Neilson, 2 Pet., 253.

That a treaty is no more the supreme law of the land than is an act of Congress is shown by the fact that an act of Congress vacates *pro tanto* a prior inconsistent treaty. Whenever, therefore, an act of Congress would be unconstitutional, as invading the reserved rights of the States, a treaty to the same effect would be unconstitutional.

See Prevost *v.* Greenaux, 19 How., 7; but see Mr. Sumner's letter to Mr. Fish, April 21, 1870; MSS. Dept. of State; cited in Mr. J. C. B. Davis, Notes, &c.

But while such a treaty may be inoperative *municipally*, it may internationally subject the United States Government to foreign claims based on its non-execution.

Supra, § 9.

A treaty executed and ratified by the proper authorities of the Government becomes the supreme law of the land, and the courts can no more go behind it, for the purpose of annulling its effect and operation, than behind an act of Congress.

Fellows *v.* Blacksmith, 19 How., 366, 372.

Territory acquired by treaty or conquest is subject, so far as concerns titles to property and prior rights of status, to the same law as it was subjected to before the transfer.

U. S. *v.* Moreno, 1 Wall., 400. *Supra*, §§ 3 *ff.*

A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.

The Cherokee Tobacco, 11 Wall., 616. See Taylor *v.* Morton, 2 Curtis, 454; The Clinton Bridge, 1 Woolworth, 150.

A treaty giving the subjects of a foreign state (Switzerland) the privilege of holding real estate in the United States is the supreme law of the land.

Hauenstein *v.* Lynham, 100 U. S., 483; aff. Chirac *v.* Chirac, 2 Wheat., 259; Carneal *v.* Banks, 10 Wheat., 181; Frederickson *v.* Louisiana, 23 How., 445; *infra*, § 163.

A treaty is primarily a compact between independent nations and depends for the enforcement of its provisions on the honor and the interest of the Governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do. But a treaty may also confer private rights on citizens or subjects of the contracting powers which are of a nature to be enforced in a court of justice, and which furnish, in cases otherwise cognizable in such courts, rules of decision. The Constitution of the United States makes the treaty, while in force, a part of the supreme law of the land in all courts where such rights are to be tried. In this respect, so far as the provisions of a treaty can become the subject of judicial cognizance in the courts of the country, they are subject to such acts as Congress may pass for their enforcement, modification, or repeal.

Head Money Cases, 112 U. S., 580.

The stipulations in a treaty between the United States and a foreign nation are paramount to the provisions of the constitution of a particular State.

Gordon *v.* Kerr, 1 Wash. C. C., 322.

A treaty is the supreme law of the land in respect of such matters only as the treaty-making power, without the aid of Congress, can carry into effect. Where a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution. Every foreign Government may be presumed to know that, so far as the treaty stipulates to pay money the legislative sanction is required.

Turner *v.* American Baptist Missionary Union, 5 McLean, 347.

Subsequent legislation may municipally abrogate a treaty which may nevertheless continue to bind internationally.

Cherokee Tobacco, 11 Wall., 616; aff. 1 Dill., 264; Taylor *v.* Morton, 2 Curtis, 454; 2 Black, 481; Ropes *v.* Clinch, 8 Blatch., 304; Bartram *v.* Robertson, 15 Fed. Rep., 212; Ah Lung, *in re.*, 18 Fed. Rep., 28; *supra*, § 9.

A stipulation in a treaty that "no higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominion of the treaty-making power * * * than are or shall be payable on the like articles, being the produce or manufacture of any foreign country," does not preclude Congress from passing an act exempting from duty like products and manufactures imported from any particular foreign dominion it may so favor.

Whitney *v.* Robertson, 21 Fed. Rep., 566.

An act of Congress repeals an inconsistent provision of a prior treaty.

5 Op., 345, Crittenden. See, however, Marshall, C. J., in 1 Cranch, 109, and Mr. Cushing in 6 Op., 658. And see *supra* § 9.

A treaty, when proclaimed, is thenceforth the law of the land, to be respected as such, although, as in the case of many laws of a merely

municipal character, some of the provisions thereof may be contingent or executory only.

6 Op., 748, Cushing, 1854.

A treaty, constitutionally concluded and ratified, abrogates whatever law of any one of the States may be inconsistent therewith.

A treaty, assuming it to be made conformably to the Constitution in substance and form, has the legal effect of repealing, under the general conditions of the legal doctrine that "*leges posteriores priores contrarias abrogant*," all pre-existing Federal law in conflict with it, whether unwritten, as law of nations, of admiralty, and common law, or written, as acts of Congress. A treaty, though complete in itself, and the unquestioned law of the land, may be inexecutable without the aid of an act of Congress. But it is the constitutional duty of Congress to pass the requisite laws. But the need of further legislation, however, does not affect the question of the legal force of the treaty *per se*.

6 Op., 291, Cushing, 1854.

Treaty stipulations may restrict or abolish the disability of aliens as to property in the several States.

8 Op., 411, Cushing, 1857.

A treaty not in itself inconsistent with the Constitution of the United States abrogates all prior inconsistent legislation, whether Federal or State.

8 Op., 417, Cushing; 6 Op., 293, Cushing; and see Ware *v.* Hylton, 3 Dall., 199; Davis *v.* Concordia, 9 How., 280.

Under the Constitution, treaties, as well as statutes, are the law of the land, both the one and the other, when not inconsistent with the Constitution, standing upon the same level and being of equal force and validity; and, as in the case of all laws emanating from an equal authority, the earlier in date yields to the later.

13 Op., 354, Akerman, 1870.

"During the administration of John Quincy Adams several treaties were concluded, in which broader views in commercial matters began to prevail. It was agreed that whatever kind of produce, manufacture, or merchandise of any foreign country could be from time to time lawfully imported into the United States in their own vessels might also be imported in vessels of the other power. These treaties were subscribed by Henry Clay, Secretary of State of the United States, and the provisions have often since been repeated in conventions with other powers. The expanding commerce of the United States induced the revival at this time of some of the powers respecting national vessels in foreign ports, and respecting disputes between the officers and crew of such vessels, and concerning deserters, which had been conferred upon consuls by Jefferson's convention with France in 1788. These important provisions were now inserted in the treaties of commerce, and continued to be until the revival of the practice of concluding exclusively consular conventions, which had lain dormant from the time of Jefferson's mission in Paris.

"Many commercial treaties were concluded during the administrations of President Jackson and President Van Buren, through which the principles, which had become part of the policy of the United States, were extended in every quarter of the globe. By the former administration also, long-pending differences with France were set at rest by a convention signed July 4, 1831; and a treaty was concluded with the Ottoman Porte, under which, for nearly forty years, it was not doubted that the citizens of the United States within the dominions of the Porte enjoyed certain rights of extraterritoriality. The doubts which have since arisen will be considered hereafter.

"President Polk carried out with assiduity the policy of the nation by extending the number of its treaties for the regulation of commerce and navigation, for the abolition of unjust taxes, and for the regulation of international postal relations, and he added to the national domain by the treaty of peace with Mexico, and concluded a treaty with Great Britain, which was intended on the part of the United States to be a final settlement of the disputed Northwestern boundary. He also caused the United States to enter into a treaty with New Granada, whereby they agree to 'guarantee positively and efficaciously to New Granada * * * the perfect neutrality of the before-mentioned Isthmus' (Panama) * * * and 'the rights of sovereignty and property which New Granada has and possesses over the said territory,' the first international obligation of this nature incurred since 1778.

"During President Taylor's short administration several treaties of commerce were entered into with other powers.

"President Buchanan released the commerce of the United States from the Danish dues at the Sound and Belts, made wider and broader the friendly relations with Japan, and he added to the number of the treaties for the regulation respectively of commerce, of extradition, and of international postage.

"William H. Seward was the Secretary of State during the administrations of President Lincoln and of President Johnson. Under his direction of the Department of State, the treaties of commerce and the consular and extradition conventions were widely extended. The commerce of the United States was relieved from the Brünshausen dues, the navigation of the Dardanelles and of the Bosphorus was regulated, and the Scheldt dues were extinguished. A treaty was entered into for the suppression of the African slave-trade, in which, for the first time since the adoption of the Constitution, it was agreed that an alien might sit as a judge in a court holding its sessions within the territories of the United States. Several treaties were made securing the recognition of the right of expatriation and naturalization, and the protection of trade-marks was also made the subject of a treaty. The relations with China, too, were essentially modified."

Mr. J. C. B. Davis, Notes, &c. See more fully *infra*, § 148.

XI. *JUDICIARY CANNOT CONTROL EXECUTIVE IN TREATY MAKING.*

§ 139.

The negotiation and modification of treaties is a prerogative of the Executive, with which the courts cannot interfere.

Frelinghuysen *v.* Key, 110 U. S., 64; Great West. Ins. Co. *v.* U. S., 19 C. Cls., 206; S. C., 112 U. S., 193, to same effect; Angarica de la Rua *v.* Bayard, 4 Mackey, 310; cited, *infra*, § 246.

The granting an injunction to restrain the Executive from making payment under a treaty is not within the province of the judiciary.

3 Op., 471; Grundy, 1839.

"I have had the honor to receive your letter of the 29th ultimo in relation to the pending application in the supreme court of this District for a writ of *mandamus* against the Secretary of State at the instance of La Abra Silver Mining Company, in which you embody, as your own, the report of Mr. Solicitor-General Phillips to you. Allow me to express my thanks for the prompt attention you have given to the matter and the personal interest you have taken in it.

"The suggestion of Chief-Justice Cartter, as reported by Mr. Phillips, namely, that a *pro forma* judgment with a view to an appeal to the Supreme Court of the United States was all that was wanted by the parties cannot be entertained for a moment with my consent. I have a most decided objection to any judgment, *pro forma* or otherwise, being rendered against the Secretary of State.

"The pending case involves, as I view it, an important question in regard to the relative powers of the several branches of the National Government. It is for this reason, if no other, entitled to a full hearing in every court through which it may have to pass before reaching the Supreme Court of the United States. * * *

"The powers of the President are fixed by the Constitution. He has in this matter only exercised the treaty-making power. Congress, a co-ordinate branch of the Government, cannot enlarge those powers, and most certainly cannot restrict or limit them."

Mr. Frelinghuysen, Sec. of State, to Mr. Brewster, Dec. 4, 1882. MSS. Dom. Let.

As will hereafter be seen, the Department of State can arbitrate or settle, at its own discretion, all claims referred to it under treaties.

Infra, § 222.

XII. *SPECIAL TREATIES.*

(1) Argentine Republic.

§ 140.

A history of the diplomatic relations of the United States with Buenos Ayres and the Argentine Republic is given in instructions from Mr. Marcy, Secretary of State, to Mr. Peden, June 29, 1854.

MSS. Inst., Arg. Rep.

The treaty of the Argentine Confederation with France for the free navigation of the rivers Parana and Uruguay will be found in Brit. For. St. Pap. for 1853–'54, 1071.

For other treaties as to the same rivers, see *supra*, § 30.

(2) AUSTRIA-HUNGARY.

§ 141.

Article 1 of treaty of 1870 with the Austro-Hungarian monarchy recognizes the right of an American citizen to change his nationality and become a citizen of Austria; but he must have had a residence in Austria of five years, and have been naturalized there, before the United States is bound to consider the person so naturalized an Austrian citizen.

14 Op., 154, Williams, 1872. See *infra*, § 171.

"The period for exchanging the ratifications of the commercial treaty of 1829 with Austria was extended, with the advice and consent of the Senate (February 3, 1831). The Emperor's consent was expressed in the certificate of ratification February 10, 1831. The treaty was communicated to the House of Representatives by the President on the 2d of March, 1831.

"On the 13th of February, 1850, the Senate extended the time for exchanging the ratifications of the treaty of 1848 to July 4, 1850, and the ratifications were exchanged on the 23d of that month.

"The naturalization treaty was sent to the Senate on the 12th day of December, 1870, with the correspondence relating to it. The ratifications not being exchanged within the limitations of the treaty, the time was extended three months."

Mr. J. C. B. Davis, Notes, &c.

(3) BARBARY POWERS.

§ 141*a*.

"'Before the war of Independence, about one-sixth of the wheat and flour exported from the United States, and about one-fourth in value of their dried and pickled fish, and some rice, found their best markets in the Mediterranean.'

"This trade then employed about 12,000 men and 20,000 tons of shipping, and was protected by British passes.

"The war of the Revolution having abrogated this protection, Congress early took into consideration plans for substituting another in its place.

"In a sketch for a treaty which that body, on the 17th of September, 1776, agreed that their commissioners should endeavor to conclude with the French King, an article was inserted to the effect that France should protect, defend, and secure, as far as in its power, the subjects, people, and inhabitants of the United States and their vessels and effects against all attacks, assaults, violences, injuries, depredations, or plunderings, by or from the King or Emperor of Morocco, or Fez, and the states of Algiers, Tunis, and Tripoli, and any of them, and every other prince, state, and power on the coast of Barbary, and the commissioners were instructed that this article 'ought to be obtained, if possible; but should be waived rather than that the treaty should be interrupted by insisting upon it.' The commissioners did not obtain such protec-

tion. Instead of it, the King of France, in the treaty of 1778, agreed to 'employ his good offices and interposition' with those powers, 'in order to provide as fully and efficaciously as possible for the benefit, convenience, and safety of the said United States, and each of them, their subjects, people, and inhabitants, and their vessels and effects, against all violence, insults, attacks, or depredations on the part of the said princes and states of Barbary, or their subjects.'

"The recognition of the independence of the United States by Great Britain found no steps taken in this direction, for reasons which appear in the official correspondence. Mr. Adams therefore wrote to the President of Congress on the 10th September, 1783: 'There are other powers with whom it is more necessary to have treaties than it ought to be; I mean Morocco, Algiers, Tunis, and Tripoli. * * * If Congress can find funds to treat with the Barbary Powers, the ministers here are the best situated. * * * Ministers here may carry on this negotiation by letters, or may be empowered to send an agent, if necessary.'

"Congress authorized a commission to be issued to Mr. Adams, Dr. Franklin, and Mr. Jefferson, which was done on the 12th of May, 1784, empowering them, or a majority of them, to treat with Morocco, Algiers, Tripoli, and Tunis, as well as with the several powers of Europe.

"On the 28th of March, 1785, these commissioners addressed a joint note to Count de Vergennes, asking his advice upon the conduct of their negotiations, and requesting that the good offices of the French King should be interposed with the Emperor of Morocco, according to the tenor of the eighth article of the treaty of 1778.

"Franklin left Paris for America on the 12th of July, 1785, and Adams and Jefferson, finding themselves engaged in the negotiation of treaties with European powers, and having received authority to empower substitutes to negotiate with the Barbary States, in October of that year commissioned Thomas Barclay to negotiate with Morocco, and John Lamb to negotiate with Algiers, and they reported their proceedings to Jay, who referred them to Congress, with a recommendation that they hould be approved.

"In the spring of the next year Jefferson was induced to go to London to meet Abdrahaman, the Tripoline embassador, who expressed a desire to negotiate with the commissioners. They found 'that 30,000 guineas for his employers, and £3,000 for himself, was the lowest terms upon which a perpetual peace could be made,' and that Tunis would treat upon the same terms, 'but he would not answer for Algiers or Morocco.' These demands were so exorbitant that the negotiations were suspended.

"Barclay was, however, instructed to continue his negotiations with Morocco.

"By the 16th of July, 1786, a treaty with Morocco was nearly agreed upon. After its conclusion Count de Vergennes wrote to the French minister in the United States: 'You can assure the Congress that the King will seize with eagerness all occasions to facilitate their good intelligence with the Barbary Powers. * * * The treaty which has been recently signed with this last power (Morocco) * * * will be the best refutation of the suspicions which many public papers are willing to inspire against our system of policy.'

"On the death of the Emperor who concluded the treaty, $20,000 was appropriated by Congress 'to the purpose of effecting a recognition of the treaty * * * with the new Emperor;' and instructions were

sent to secure the recognition for the $20,000, if possible; if not, for $25,000.

"The treaty was renewed, or rather recognized, by the new Emperor, who wrote to President Washington: 'We have received the present at his [the consul's] hands with satisfaction. * * * Continue writing letters to us; * * * we are at peace, tranquillity, and friendship with you, in the same manner as you were with our father, who is in glory.'

"In 1803 a Moorish pirate captured an American vessel, which was released by force by an American frigate; and when hostile demonstrations were threatened for this breach of the treaty, the Emperor issued an order that 'the American nation are still, as they were, in peace and friendship with our person, exalted of God.'

"The treaty concluded in 1787, to endure for fifty years, was, in its forty-ninth year, renewed for another fifty years, and for such further time as it should remain unaffected by notice.

"In 1865 a convention was concluded for maintaining a light-house at Cape Spartel. The correspondence respecting it will be found in the Senate documents.

"About the commencement of the year 1791 Mr. Jefferson, the Secretary of State, reported to President Washington that there were held captive as slaves in Algiers two American masters, for whose ransom 3,000 sequins each were demanded; two mates, for whom 2,000 sequins each were asked; and ten sailors, held at 750 sequins each; and he reported to Congress that the navigation into the Mediterranean had not been resumed at all since the peace; and that the sole obstacle had been the unprovoked war with Algiers, and the sole remedy must be to bring that war to an end, or to palliate its effects.

"On the 8th of May, 1792, President Washington asked the Senate whether in case a treaty should be concluded with Algiers for the ransom of the thirteen Americans for a sum not exceeding $40,000, the Senate would consent; and whether they would consent to a treaty of peace stipulating for the payment of $25,000 on the signature of the treaty, and a like sum annually? The Senate answered each question in the affirmative, and the President appointed Admiral John Paul Jones a commissioner to negotiate a treaty, with Thomas Barclay as a substitute, in case Jones should not act. Jones died before the appointment could reach him, and Barclay died soon after, without going to Morocco. Col. David Humphreys, then the minister of the United States at Lisbon, was thereupon appointed a plenipotentiary in their place. Eight hundred thousand dollars were placed at his disposal, and he was instructed that 'the President has under consideration the mode in which the $800,000 may be expended in the purchase of a peace; that is, how much shall be applied to the ransom, and how much to the peace.' More precise instructions followed on the 25th of August, 1794. A Swede named Skjoldebrand, brother of the Swedish consul at Algiers, interested himself in the unfortunate captives, and informed Humphreys (who remained at Lisbon) that a peace could be obtained for the United States for about the following sums (in dollars), viz: 'For the treasury, in money or timber of construction, fifty thousand; for the great officers and relations of the Dey, one hundred thousand; consular present, thirty thousand; redemption of slaves, from two hundred to two hundred and fifty thousand; in all, between six and seven hundred thousand; together with an annual tribute of from twenty-five to thirty

thousand, and a consular present every two years of about nine or ten thousand dollars. Humphreys sent this communication home, and received instructions 'that Skjoldebrand's terms are to be acceded to if better cannot be obtained.' Only a few days before this instruction was written the Secretary of State had informed Colonel Humphreys of the wishes of the Government and the country on this subject: 'You are by this time,' he said, 'apprised of the expectation of the President, that you will continue your labors on this head, and of your title to draw for eight hundred thousand dollars, to soothe the Dey into a peace and ransom. The humanity of our countrymen has been long excited in behalf of our suffering fellow-citizens.' In March, 1795, Donaldson, the consul to Tunis and Tripoli, was associated with Humphreys, and the latter was also authorized to employ Skjoldebrand in negotiating the treaty with the Dey. Joel Barlow was added to the negotiators by Monroe and Humphreys in Europe. Donaldson arrived in Algiers on the 3d of September, and concluded the treaty on the 5th, on which day Barlow arrived, and they joined in their report to Humphreys.

"Congress was informed by President Washington, in his speech at the opening of the second session of the Fourth Congress, of the probability that the treaty would be concluded, 'but under great, though inevitable disadvantages in the pecuniary transactions occasioned by that war.' A few days later the House called for information as to the measures taken to carry the treaty into effect, which was communicated confidentially on the 9th January, 1797. The bill making appropriations for these objects was discussed with closed doors, and was passed February 22, 1797, by 63 ayes and 19 nays. The Secretary of the Treasury estimated the whole expense of fulfilling the treaty at $992,463.25. In March, 1802, President Jefferson was able to advise Congress that 'the sums due to the Government of Algiers are now fully paid up.'

"In 1808, an inquiry being made by Congress respecting the payments to Algiers, the Secretary of State reported that they were 'of two kinds: (1) that stipulated by treaty, viz: twelve thousand sequins, equal to twenty-one thousand six hundred dollars, made annually in naval stores. (2) Those made in conformity with what is called usage at Algiers, by which it is understood we are bound. These are: (1) the present on the presentation of a consul, $20,000. (2) The biennial presents to the officers of the Government, estimated at $17,000. (3) Incidental and contingent presents, as well on the promotion of the principal officers of the Dey and regency, as for the attainment of any important object. Of these no estimate can be made.'

"The course pursued by Algiers during the last war with Great Britain induced President Madison, in February, 1815, to recommend Congress to declare war against the Dey. The committee to whom the message was referred reported that war existed and was being waged by the Dey against the United States. A naval force was despatched to Algiers, and an Algerian frigate and brig were captured en route to that place. The squadron arrived off Algiers on the 28th of June, and on the 29th opened communications with the Government. The next day the Dey proposed a treaty. The American negotiators replied by forwarding a draft for a treaty, and by declaring that 'the United States would never stipulate for paying tribute under any form whatever.' The Dey and his officers asked for time, but it was refused. 'They even pleaded for three hours. The reply was "not a minute," and the treaty was signed and the prisoners released.'

"The papers relating to the only remaining treaty with Algiers (that of 1816) will be found in 5 F. R. F., 133 *ff.*

"On the 4th of November, 1796, Barlow concluded a treaty with the Bashaw of Tripoli. 'The price of the peace was advanced' to the United States by the Dey of Algiers. But the Bashaw did not long rest contented. In April, 1800, he told Catheart, the American consul, to say to the President that he was 'pleased with the proffers of friendship,' but 'that had his protestations been accompanied with a frigate or brig of war * * * he would be still more inclined to believe them genuine.' On the 12th of May he said to him, 'why do not the United States send me a voluntary present? * * * I am an independent prince as well as the Bashaw of Tunis, and I can hurt the commerce of any nation as much as the Tunisians.' The same month he wrote to the President, 'Our sincere friend, we could wish that these your expressions were followed by deeds, and not by empty words. * * * If only flattering words are meant, without performance, every one will act as he finds convenient. We beg a speedy answer, without neglect of time, as a delay on your part cannot but be prejudicial to your interests.'

"The answer made was a naval squadron and a war against Tripoli on land and at sea, which was terminated on the 4th of June, 1805, by a treaty signed on board of an American man-of-war in the harbor of Tripoli. Nothing was paid for the peace. Prisoners were exchanged man for man, and $60,000 were paid by the United States for the release of the number of American prisoners in the hands of the Tripolines over and above the number of Tripolines in the hands of the Americans. They were about two hundred.

"The treaty with Tunis was negotiated under the directions of Barlow in 1797. It cost one hundred and seven thousand dollars, viz: $35,000, regalia; $50,000, peace; $12,000, peace presents; $4,000, consul's presents; and $6,000 secret service. The Senate advised its ratification, on condition that the 14th article should be modified. This modification appears to have been assented to in 1799. See 2 F. R. F., 799, and 3 F. R. F., 394, for correspondence, &c., respecting other questions arising between the two powers.

"In 1824 the modified articles were agreed to in the form in which they now stand.

"In the interesting report of Jefferson to the House of Representatives concerning the Mediterranean trade, which has been already referred to, three modes of dealing with the Barbary pirates are indicated: (1) To insure vessels and cargoes and to agree upon a fixed rate of ransom for prisoners. (2) To purchase peace. (3) To conquer a peace; and he concludes: 'It rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce.'

"Under the policy adopted by Congress the 'total amount of real expenditures' 'exclusive of sundry expenses incurred but not yet paid' were stated by the Secretary of the Treasury, on the 30th July, 1802, at $2,046,137.22. This was before the war with Tripoli.

"The statutes under which payments were made are the following: 1791, ch. 16, 1 Stat. L., 214; 1792, ch. 24, *ibid.*, 256; 1796, ch. 19, *ibid.*, 460; 1797, ch. 12, *ibid.*, 505; 1797, ch. 12, *ibid.*, 553; 1798, ch. 18, *ibid.*, 544; 1799, ch. 28, *ibid.*, 723; 1800, ch. 47, 2 Stat. L., 66; 1803, ch. 19, *ibid.*, 215; 1804, ch. 21, *ibid.*, 269; 1805, ch. 21, *ibid.*, 321; 1806, ch. 33,

ibid., 388; 1807, ch. 29, *ibid.*, 436; and from this time forward there was an annual appropriation until the tribute was terminated."

Mr. J. C. B. Davis, Notes, &c.

For an account of negotiations with the Barbary Powers, see 3 Life of Pickering, 271; 2 Lyman Diplomacy of U. S., chap. xiii.

For the details of the negotiations with Algiers in 1795–'96, see Todd's Life of Barlow, 1886, chap. vi. As to Tripoli and Turkey, see *infra*, §§ 164, 165.

(4) BAVARIA.

§ 142.

An exposition of the naturalization treaty with Bavaria is given in the letter of Mr. Fish, Sec. of State, to Mr. Weil, April 14, 1870. MSS. Dom. Let.

See *infra*, §§ 171, *ff.*

The convention between the United States and Bavaria of 1853 was not abrogated by the operation of the constitution of the German Empire of 1871.

In re Hermann Thomas, 12 Blatch., 370.

"The treaty (of 1845 with Bavaria) was submitted to the Senate, and ratified by it on the 15th March, 1845, with an amendment striking out from the third article the words 'real and.' The copy for exchange, with this amendment, was sent to Mr. Wheaton, and a copy was transmitted by him to the Bavarian minister at Berlin; and after long deliberation the amendment was accepted by the Bavarian Government."

Mr. J. C. B. Davis, Notes, &c.

(5) BRAZIL.

§ 143.

For criticism on commercial discriminations in Brazil against the United States, see Mr. Forsyth, Sec. of State, to Mr. Hunter, Nov. 29, 1836. MSS. Inst. Brazil. Mr. Upshur, Sec. of State, to Mr. Proffit, Aug. 1, 1843; *ibid.* Mr. Cass to Mr. Meade, Sept. 15, 1857; *ibid.*

As to abrogated treaties with Brazil, see *supra*, 137*a*.

"On the 26th of March, 1840, Mr. Chaves, the Brazilian minister at Washington, wrote thus to the Secretary of State: 'The Imperial Government is obliged not to prolong the duration of the treaty concluded between the Empire and this Republic, of December 12, 1828; therefore, by the terms contained in article 11 of the said treaty, at the expiration of twelve months from this date the said treaty will be terminated, only for the articles relating to commerce and navigation.' (MSS. Records, Dept. of State.) This notice was received on the 27th of March, 1840, and was answered by Mr. Forsyth, Secretary of State, on the 20th of June, 1840, thus: 'Although each party has reserved to itself the right of terminating the treaty at the expiration of twelve months from the date of the notification of its intention, yet the privilege of giving such notification is so restricted that neither party can give it before the

expiration of the twelve years stipulated for the duration of the treaty; that consequently the earliest date at which the notice intended to be conveyed by Mr. Chaves' note can be given, is the 12th of December of this year, and that the earliest period at which, under any circumstances, the treaty can cease to be operative, is the 12th of December of the year 1841. The President, however, anxious at once to gratify the wishes of the Brazilian Government, and to show, by his readiness to comply with the spirit of the treaty, the sincerity of the disposition with which, in all its clauses, it has been fulfilled by the United States, is willing to overlook the departure from the strict letter of the instrument involved in the premature notice given in Mr. Chaves' note, and to receive said notice as if given in accordance with the terms of the treaty at the expiration of the twelve years.'"

Mr. J. C. B. Davis, Notes, &c.

For the correspondence in the negotiation of the treaty, see House Ex. Doc. 32, 1st sess., 25th Cong.

(6) China.

§ 144.

As to relations of the United States with China, see generally *supra*, § 67.

"In a recent dispatch to this Department in relation to the emigration of Chinese subjects from their own land to other countries, one of the United States consuls in China transmitted for the information of the Department what purports to be a transcript of section cclv of the penal code of China, as translated by Sir George Thomas Staunton, F. R. S., an English baronet, whose translation is reputed to be the only one known. The law referred to is in relation to the vicarious punishment to be inflicted upon the relatives of a Chinaman who may renounce his country and allegiance, and it may therefore be of interest to this Government in connection with the large Chinese immigration on our Pacific coast, to be conversant with the nature of this among the other Chinese statutes touching the general subject.

"I have the honor, therefore, to inclose herewith a copy of the translated law as received from the consul, and to inquire whether the same correctly represents the law, and whether it is understood to be now in force in all or any part of the dominions of His Imperial Majesty."

Mr. Evarts, Sec. of State, to Mr. Yung Wing, Feb. 17, 1880. MSS. Notes, China; For. Rel., 1880.

The inclosed document is as follows:

"All persons renouncing their country and allegiance, or devising the means thereof, shall be beheaded; and in the punishment of this offense no distinction shall be made between principals and accessories.

"The property of all such criminals shall be confiscated, and their wives and children distributed as slaves to the great officers of state. Those females, however, with whom a marriage had not been completed, though adjusted by contract, shall not suffer under this law; from the penalties of this law, exception shall also be made in favor of all such daughters of criminals as shall have been married into other families. The parents, grandparents, brothers, and grandchildren of such criminals, whether habitually living with them under the same roof or not, shall be perpetually banished to the distance of 2,000 *li*.

"All those who purposely conceal and connive at the perpetration of this crime shall be strangled.

"Those who inform against and bring to justice criminals of this description shall be rewarded with the whole of their property.

"Those who are privy to the perpetration of this crime and yet omit to give any notice or information thereof to the magistrates shall be punished with 100 blows, and banished perpetually to the distance of 3,000 *li*.

"If the crime is contrived, but not executed, the principal shall be strangled and all the accessories shall each of them be punished with 100 blows and perpetual banishment to the distance of 3,000 *li*.

"If those who are privy to such ineffective contrivance do not give due notice and information thereof to the magistrates, they shall be punished with 100 blows and banished for three years.

"All persons who refuse to surrender themselves to the magistrates when required, and seek concealment in mountains and desert places in order to evade either the performance of their duty or the punishment due to their crimes, shall be held guilty of an intent to rebel, and shall therefore suffer punishment in the manner by this law provided. If such persons have recourse to violence and defend themselves when pursued, by force of arms, they shall be held guilty of an overt act of rebellion, and punished accordingly."

"Your communication of the 17th ultimo, containing an inclosure of a translation of section cclv of the penal code of China, as translated by Sir George Thomas Staunton, and inquiring 'whether the same correctly represents the law, and whether it is now understood to be in force in all or any part of the dominions of His Imperial Majesty,' was duly received, and I have the honor to say in reply that section cclv of the Chinese penal code referred to has no reference whatever to Chinese emigration as contemplated in and sanctioned by the Burlingame treaty. Under the general head of 'Renunciation of allegiance,' the specific acts so carefully defined, with their corresponding punishments, point to the presumptive existence of a lesser or greater degree of treasonable intent against the Government, and it contemplates conspiracies and overt acts of rebellion against the Government as being the logical sequence of 'renunciation of allegiance,' which antecedes them both in time and existence; hence their classification under that head or section. Emigration, as sanctioned by foreign treaties, is taken out of the category of treasonable acts, and is therefore beyond the scope of the section.

"In Article V of the Burlingame treaty we find this language, which is conclusive on this point: 'The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance.'"

Mr. Yung Wing to Mr. Evarts, Mar. 2, 1880; *ibid.*

"I am alike honored and gratified in being enabled to inform you that the President, by and with the advice and consent of the Senate, has appointed two of our distinguished citizens, Messrs. John F. Swift, of California, and William Henry Trescot, of South Carolina, as commissioners, to act conjointly with the envoy extraordinary and minister plenipotentiary of the United States to China, to negotiate and conclude a settlement by treaty of such matters of interest to the two Governments, now pending, as may be confided to them.

"It is expected that these commissioners, in company with the newly appointed minister to China, Mr. James B. Angell, will sail from San Francisco, *en route* to Peking, in the steamer of the 17th of June proximo.

"I have instructed the present minister near the Government of His Imperial Majesty to take as early an opportunity as may be practicable and proper to acquaint the Chinese Government with the high mission of these gentlemen, and to make fitting arrangements in advance of their arrival for their appropriate reception in their elevated diplomatic character as the specially commissioned plenipotentiaries of the President and Government of the United States.

"I take a singular satisfaction in expressing to you, and through you to the Government you so worthily represent, the assurances of the President's deep conviction that the sending of this high commission to China cannot fail to draw closer even than before the bonds of amity between the two Governments, by opening a favorable channel for the speedy and harmonious adjustment of the questions of moment now pending between them, and that the result of its wise and conciliatory counsels, met in a like spirit of wisdom and conciliation by the enlightened statesmen who rule the destinies of the great Empire of the East, will build up a lasting monument of the good will and kindred interests which animate the two nations.

Mr. Evarts, Sec. of State, to Mr. Yung Wing, May 25, 1880. MSS. Notes, China; *ibid.*

"I have the honor to acknowledge the receipt of your note of the 9th instant, whereby you informed this Department of the expected arrival at San Francisco of the Chinese steamer Wo Chung, being the first of her class to enter an American port, and, in order to prevent any misunderstanding in regard to duties or other charges, you request that the Secretary of the Treasury be notified, to the end that the customs authorities at San Francisco may extend to that vessel the privileges conceded to vessels of other nations in treaty relations with the United States. The matter was forthwith referred to the Secretary of the Treasury, from whom I now learn that under the laws of the United States and the provisions of the existing treaties with China it will be necessary to exact tonnage tax at alien rates.

"It appears that discriminating duties of tonnage and impost on foreign vessels and their cargoes are to be charged, as provided by law (§ 4219, Rev. Stat.), in all cases except where exemption is secured by treaty stipulations, or where special exemption is proclaimed by the President upon evidence of reciprocal exemption accorded to vessels of the United States, comformably to the provisions of section 4228 of the Revised Statutes, or where an exemption is created otherwise by law.

"The treaties between the United States and China do not establish reciprocal exemption from discriminating taxes. While the tonnage tax to be collected from American vessels in the open ports is fixed by the treaty of June 18, 1858, between the two countries, it does not appear that Chinese vessels entering those ports are subject to the same

charges. Neither does it appear that Chinese vessels resorting to the ports of the United States may not trade directly with the closed ports of China whither American vessels are debarred from going.

"Under these circumstances the Secretary of the Treasury, conforming to the prescriptions of the statute as to tonnage duties, section 4219 of the Revised Statutes, has directed the collector of customs at San Francisco to exact, upon the arrival of the steamer, tonnage tax at alien rates, in addition to the ordinary tonnage tax paid annually, if the vessel be engaged in regular voyages between the two countries. He has, however, reserved for the present, consideration and decision of the questions of duties on the cargo which the vessel may bring."

Mr. Hay, Acting Sec. of State, to Mr. Yung Wing, Aug. 13, 1880. MSS. Notes, China; *ibid.*

"Referring to your note of the 9th instant relative to the expected arrival of the Chinese steamer Wo Chung at the port of San Francisco, and to my reply thereto of the 13th, I have now the honor to inform you that the reserved question of the customs duties of importation chargeable upon the cargo which the vessel may bring has received careful consideration.

"Like the question of alien tonnage dues, of which my former note treated, the matter of customs duties on cargo entering the ports of the United States from foreign ports is one to be exclusively decided, in the absence of specific and reciprocal exemption by treaty, according to the domestic legislation of the country.

"The existing treaties of commerce between the United States and China do not provide for such reciprocal exemption, but stipulate solely 'that citizens of the United States shall never pay higher duties' [on merchandise entering China] 'than those paid by the most favored nations.' The question is, therefore, remitted to the domestic legislation of the United States. That legislation prescribes, in section 2502 of the Revised Statutes, a discriminating duty of ten per centum ad valorem in addition to the regular duties imposed by law on goods imported in vessels not of the United States; but it also provides that this discriminating duty shall not apply to merchandise imported in alien vessels, which are entitled by treaty *or any act of Congress* to enter the United States on the same footing as though imported in vessels of the United States.

"An act of Congress applicable to the case in point, is found embodied in section 4228 of the Revised Statutes, which empowers the President, upon satisfactory proof being given by the Government of any foreign nation that no discriminating duties of tonnage or import are there levied upon United States vessels, or upon merchandise carried thither in American bottoms, to issue a proclamation suspending and discontinuing the discriminating duties aforesaid with respect to

the vessels and cargoes coming to the United States under the flag of such foreign nation.

"In order, however, that the discretionary authority conferred by this enactment should be applied in conformity with its entire spirit as well as its letter, it becomes necessary that the satisfactory proof it contemplates shall cover not merely American imports into China, but the flag under which they enter the Empire, on which point the treaty is silent.

"It is found practicable, in this view of the question, to join the question of tonnage dues, treated of in my former note, to the question of customs duties now under consideration between us, inasmuch as both matters are within the competency of the President under the above-mentioned section 4228 of the statutes.

"I have, therefore, the honor to inquire whether you are prepared to support the request contained in your note of the 9th instant, for the accordance of the most favored nation treatment to the Wo Chung, and consequently to Chinese vessels in general which may enter our ports with cargo, by giving, on behalf of your Government, satisfactory proof on the following points:

"First. Are any other or higher tonnage dues exacted in the open ports of China, from vessels of the United States resorting thereto, than are paid by Chinese vessels or any foreign vessel engaged in like trade therewith?

"Second. Are any other or higher customs duties of impost exacted in China from American citizens importing merchandise thither than are paid by Chinese subjects, or the citizens of the most favored power, importing the like merchandise into China?

"Third. Is there any discriminating or additional customs duty imposed upon merchandise, whether of American or foreign origin, entering the open ports of China in vessels of the United States, which is not imposed upon the like goods entering those ports in Chinese vessels, or in the vessels of any foreign power?

"I have thus presented my inquiries in categorical form, in view of the circumstance that the most favored nation treatment which is sought by your note of the 9th, for the Wo Chung and her cargo, is identical with that which a vessel of the United States and her cargo receive on entering the ports of the United States. I have also, as you will perceive, limited my inquiries to the open ports of China, because a Chinese vessel coming from or trading with a port of the Empire closed to the commerce of non-Chinese vessels would necessarily have no claim to exemption or favor based upon reciprocity of treatment.

"Upon the receipt of your reply to the foregoing inquiries, the Department will be in a position to decide whether and to what extent the case of the Wo Chung and vessels of her class come within the discretionary power of the Presidential proclamation contemplated in

section 4228 of the Revised Statutes, both as to tonnage and customs duties.

Mr. Hay, Acting Sec. of State, to Chen Lan Pin, Aug. 23, 1880. MSS. Notes, China; For. Rel., 1880.

"On the 28th of June, 1882, the chargé d'affaires *ad interim* of your legation, Mr. Tsu Chan Pang, wrote to me touching the question arising under the act of May 6, 1882, relative to the transit across the territory of the United States of Chinese laborers proceeding to or returning from Cuba and other foreign countries.

"I am happy to inform you that this Government has reached the conclusion that the transit through the United States of Chinese subjects, proceeding to or from a third country, is permissible under the act in question, with certain precautions against abuses.

"An opinion which I have received from the Attorney-General sets forth the grounds on which this conclusion is reached, which, briefly recapitulated, are as follows:

"The preamble of the act itself reads:

"'Whereas, in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof; [and it is thereupon enacted that] the coming of Chinese laborers to the United States be * * * suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or having so come, * * * to remain within the United States.'

"The act is based upon the treaty of November 17, 1880, the provisions whereof it is designated to execute. In that treaty it is premised that 'a modification of existing treaties' has become necessary in consequence of the increasing immigration of Chinese laborers and the embarrassments caused by such immigration; and thereupon the Government of China agrees that whenever in the opinion of this Government injurious effects are threatened or caused by 'the coming of Chinese laborers to the United States or their residence therein,' such coming or residence may be regulated, limited, or suspended, but may not be absolutely prohibited. The treaty adds:

"'The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.'

"In the view of the Attorney-General, the act of May 6, 1882, being intended to carry into effect the stipulations of the treaty, is to be construed in the light thereof, and has reference only to the Chinese who come here to stay as laborers. It is only with immigrants and with those who come as laborers that the treaty and the statute deal. Looking, therefore, at the mischief and the remedy, and to the treaty and act taken together, this Government, adopting the conclusion of the

Attorney-General, does 'not think that a Chinese laborer coming to this country merely to pass through it can be considered as within the prohibition of the law, he being neither an immigrant nor a laborer coming here as laborer.'

"With regard to the necessity of Chinese laborers in transit being provided with evidence that they are not Chinese coming here as immigrants or as laborers, the Attorney-General says:

"'As the prohibition of the act applies to Chinese laborers coming into the country to stay as laborers, and as the regulations touching certificates of identification prescribed by the fourth and sixth sections are ancillary to that end, and intended to prevent frauds upon the act, and therefore applicable to Chinese coming here for permanent or temporary residence, I am of opinion that Chinese passing through this country to other countries are not required, before crossing our borders, to produce the specified certificates of identification, provided they competently prove in some other manner their status as mere transient passengers; of course the certificate would dispense with other proof. The character of such proof may very properly be regulated by the Secretary of the Treasury.'

"I have brought the matter, in this shape, to the attention of the Secretary of the Treasury, and requested that he will frame such regulations as may be necessary to permit the transit of Chinese laborers. As soon as the action of my colleague shall be made known to me, I will communicate it to you."

Mr. Frelinghuysen, Sec. of State, to Mr. Cheng Tsao Ju, Jan. 6, 1883. MSS. Notes, China; For. Rel., 1883.

As to Chinese immigration to the United States, see *supra*, § 97.

"Referring to my note to you of the 6th ultimo, in relation to the transit of Chinese laborers through the territory of the United States, when passing to or from a third country, I have now the honor to transmit, for your information, four copies of a recent circular issued by the Secretary of the Treasury, in which are set forth the conditions under which such transit may be accomplished."

Same to same, Feb. 2, 1883; *ibid.*

"*Transit of Chinese laborers over the territory of the United States in the course of a journey to or from other countries.*

"TREASURY DEPARTMENT,
"*Washington, January* 23, 1883.

"TO COLLECTORS OF CUSTOMS AND OTHERS:

"The Attorney-General, in an opinion of December 26, 1882, addressed to the Secretary of State, has decided that Chinese laborers, in transit merely across the territory of the United States in the course of their journey to or from other countries, are neither emigrants nor 'Chinese coming to the United States as laborers,' within the language of the treaty of November 17, 1880, or the act of May 6, 1882, and further,

that it is not incumbent upon such passengers to produce the certificates of identification prescribed by sections 4 and 6 of that act, provided that, by competent proof, they may otherwise establish their transient status.

"The Department of State has transmitted the opinion of the Attorney-General to this Department with its approbation. Treasury decision No. 5313, dated July 20, 1882, is therefore revoked, and the following regulations are adopted by this Department to carry into effect the more recent opinion of the Attorney-General and the views of the Department of State:

"'1. Where a Chinese consul resides at the port of landing or entrance into the United States of any Chinese laborer claiming to be merely in transit through the territory of the United States, in the course of a journey to or from other countries, the certificate of such Chinese consul, identifying the bearer by name, height, age, &c., so far as practicable, and showing the place and date of his arrival, the place at which he is to leave the United States, the date when his journey is to begin, and that it is to be continuous and direct, shall be accepted as *prima facie* evidence. And such certificate shall be required in all cases where a Chinese consul resides at such port.

"'2. In the absence of such certificate, other competent evidence to show the identity of the person and the fact that a *bona fide* transit only is intended, may be received. The production of a through ticket across the whole territory of the United States intended to be traversed may be received as competent proof, and should be exhibited to the collector and verified by him. Such tickets and all other evidence presented must be so stamped or marked and dated by the customs officer as to prevent their use a second time.

"'3. In the case of numbers of Chinese being transported in a body under the charge of agents or others, the affidavits of such agents or others in charge, with proof satisfactory to the collector that such laborers will be conveyed without delay across the territory of the United States and delivered on board ship or into foreign territory, may be received in lieu of the tickets required in the foregoing regulation.

"'Descriptive lists of all such Chinese will be prepared in duplicate and presented to the collector of customs, substantially in the form mentioned in the circular of May 19, 1882 (Synopsis 5231), and showing, in addition, the place and date of arrival and the place and date of intended departure, and, when practicable, the route to be traveled. One copy will be retained on the files of his office, and one to be forwarded by mail to the collector of customs at the port of exit, who will take pains to see that the passengers duly leave the United States. If they do not, he will report the fact to this Department. One list may be made to include all Chinese transported at one time, and each list should be properly dated, signed, and sealed by the collector or his deputy.

"'Where considerable numbers of Chinese intend to travel from the port of entrance to the port of exit under the charge of an agent, as before mentioned, it will be sufficient to have included in the descriptive list to be mailed to the collector at the port of exit the number of persons who are to go forward, the name of the agent in charge, and the route by which they are to travel.'

"CHAS. J. FOLGER,
"*Secretary.*"

"Referring to your note of the 5th instant, concerning the operation of Rule 3 of Circular No. 5 issued by the Treasury Department January 23, 1883, governing the 'transit of Chinese laborers over the territory of the United States in the course of a journey to or from other countries,' I have now the honor to apprise you of the receipt of a letter of the 16th instant from the Acting Secretary of the Treasury on the subject.

"Concerning your intimation that such rule should discriminate between those persons who may be prosecuting their journey voluntarily and those who may be vouched for by the agent of the transportation company over whose lines they may travel, and Chinese laborers who come to this country in large bodies from China, under contract, Mr. French expresses the opinion that the Treasury Department could not inquire into the character of the persons who may be affected by that circular, but holds that if they are laborers in transit over the territory of the United States and in charge of any agent, they come within the rule specified.'

Mr. Frelinghuysen, Sec. of State, to Mr. Cheng Tsao Ju, Feb. 23, 1883; *ibid.* See *supra*, § 67.

"Under the treaty of November 17, 1880, between the United States and China, restricting the immigration of Chinese laborers into the United States, this Government is bound to interpose no obstacle to the free movement of Chinese of the excepted non-laboring classes who may come to this country.

"United States consular officers are bound by that treaty to issue certificates to Chinese subjects not laborers, going to the United States from places where there may be no competent Chinese representative. It is advisable that there should be a fixed form for these certificates so that they may conform with law and treaty.

Mr. Bayard, Sec. of State, to Mr. Manning, Aug. 11, 1885. MSS. Dom. Let. See *supra*, § 67.

"As regards the conflict between the treaty of 1858 and that of 1880, there can be no question that the latter, being more recent, is to prevail. If there be a question between either treaty and subsequent Chinese legislation, the Department's opinion is that, internationally, such legislation cannot affect treaty obligations. I therefore affirm your suggestion that 'in cases in which an American is sued by a Chinese subject, the United States consul shall invite the proper official of the plaintiff's nationality to sit with him at the hearing, to watch the proceedings, to present and examine and cross-examine witnesses, and to protest, if he pleases, in detail.'"

Mr. Bayard, Sec. of State, to Mr. Denby, Dec. 12, 1885. MSS. Inst., China.

"I have received your letter of the 16th instant relative to the Chinese.

"1. As to naturalization, the only treaty provision in the matter is the last clause of article 6 of the Burlingame treaty, signed July 28, 1868, a copy of which, with the passage referred to marked, is herewith transmitted. The pertinent statutory provision is found in section 14 of the existing Chinese immigration act of May 6, 1882, as follows:

"'Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.'

"2. As to return, the same act of May 6, 1882, and the later act of July 5, 1884, amendatory thereof, prescribe the conditions under which Chinese may leave the United States and return hither. Copies of these two acts are also transmitted.

"Your third question reads as follows:

"'Can a father, a respectable resident of this city [New Orleans], of Chinese birth, have his young son brought to him from China?'

"This would appear to depend on whether the father belongs to the class exempted by the treaty.. If the father be a laborer, it would probably be held that his privilege of residence and power to go and come is personal only to himself, and cannot extend to members of his household. But this Department cannot decide such questions. The execution of the provisions of the acts of Congress mentioned is intrusted to the Secretary of the Treasury, to whom the inquiry may be addressed to enable an opinion to be given on them of the particular case, and not as a hypothetical inquiry."

Mr. Bayard, Sec. of State, to Miss Saunders, Mar. 23, 1886. MSS. Dom. Let. As to naturalization, see *infra*, §§ 171, *ff*.

"The prohibition of Article II of the treaty of 1880 not only covers the importation, transportation, purchase, or sale of opium by American citizens in China, but extends also to vessels owned by such citizens, whether employed by themselves or by others in the opium trade. Logically, a building owned by an American citizen and used by another person for the storage of opium, would come within the extended prohibition. But there may be room to question whether, as the treaty stands, the prohibition as to an American owned vessel employed by 'other persons' in the opium trade is not strictly limited to cases where such 'other persons' are agents or factors of the American owner, or where the owner is privy to the unlawful use to which his property is to be put. The intent, however, is clear that no American citizen in China shall engage in or knowingly aid others to carry on the opium traffic.

"The provision of the treaty is not self-executing. The enforcement of the prohibition, as to American citizens in China, is expressly dependent upon 'appropriate legislation' on the part of the United States. It is only such legislation that consuls of the United States in China can enforce judicially. In the absence of such legislation, it is, to say

the least, doubtful whether a consul could lawfully interfere to prevent an American citizen from doing an act not in itself contrary to international law or the domestic law of China.

"If, however, the contemplated employment of the American owned premises by a British subject be opposed by China, and the lease sought to be prevented by the authorities of the latter, the consul would be justified in withholding his approval from the sub-lease.

"Or, to state the case briefly in another form:

"While the Department regards it as perhaps somewhat doubtful whether the treaty of 1880 precludes such a sub-lease as the one proposed, and finds itself rather unwilling to differ from your conclusions on this point, since, being on the spot, you can best judge of the true condition of affairs, yet there certainly appears little room to doubt that if the treaty as to opium is dependent on 'appropriate legislation,' it cannot become effective in the absence of such legislative action; and no legislation has yet been adopted to execute the opium clause of the treaty of 1880, so far as this Government is concerned."

Mr. Bayard, Sec. of State, to Mr. Denby, May 14, 1886. MSS. Inst., China.

See further as to treaty with China, *supra*, § 67; as to consular courts in China, *supra*, § 125.

Papers showing the importance of a commercial treaty with China, and a naval force to be there placed, will be found in House Doc. 40, 26th Cong., 1st sess. An elaborate report made by the Secretary of State on February 25, 1840, on United States trade with China, will be found in House Ex. Doc. 119. 26th Cong., 1st sess. For claims against China see House Ex. Doc. 12, 40th Cong., 3d sess.

The report of a special committee (Mr. Sargent, chairman), February 27, 1877, on Chinese immigration, is given in Senate Report 689, 44th Cong., 2d sess.

For construction of treaties of 1844, 1858, 1868, and 1880, in reference to the rights of Chinese in the United States, see Mr. Bayard's note to Cheng Tsao Ju, February 15, 1886, House Ex. Doc. 102, 49th Cong., 1st sess., *supra*, § 67.

The act of 1848 (9 Stat., 276, act 1860, substituted Rev. Stat., § 4083), to carry into effect certain provisions of the treaties between the United States and China, not having designated any particular place for the confinement of prisoners arrested for crime, the same is left for regulation under section 5, or in the absence of regulation, to the discretion of the acting officer.

5 Op., 67, Toucey, 1849. See *supra*, § 125.

By the treaty with China of 1844, Articles XXI and XXV, all citizens of the United States in China enjoy complete rights of extra-territoriality, and are amenable to no authority but that of the United States.

7 Op., 495, Cushing, 1855.

The judicial authority of the United States commissioner to China is restricted to the five ports mentioned in the treaty with that nation of 1858.

9 Op., 294, Black, 1859.

Questions concerning intervention in China are discussed *supra*, § 67.

"On the 3d of March, 1843, an act was approved placing forty thousand dollars 'at the disposal of the President of the United States to enable him to establish the future commercial relations between the United States and the Chinese Empire on terms of national equal reciprocity,' and on the 8th of the following May, Caleb Cushing was commissioned as envoy extraordinary, minister plenipotentiary, and commissioner to China.

"He says of his mission there: 'I entered China with the formed *general* conviction that the United States ought not to concede to any foreign state under any circumstances jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations—in a word, a Christian state. * * * In China I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the Empire. * * * I deemed it, therefore, my duty to assert a similar exemption on behalf of citizens of the United States.' A treaty on this basis was concluded on the 3d day of July, 1844, and was communicated to the Senate by the President on the 22d of January, 1845; and on the 28th of January the injunction of secrecy was removed from the correspondence submitted with the treaty.

"On the exchange of the ratifications of this treaty, it became necessary that laws should be enacted conferring judicial powers on ministers and consuls, in order that citizens of the United States in China might enjoy the protection and rights conferred by the treaty. Congress proceeded in this matter with such good judgment that all conflicting views were harmonized in committee, and the act was passed without discussion, and was approved on the 11th of August, 1848.

"Under this act it was originally held that vice-consuls could not be empowered to exercise judicial functions; but this decision was reversed by Attorney-General Cushing.

"The act of 1848 empowered the commissioner, with the advice of the several consuls, to make regulations for carrying the provisions of the treaty into effect.

"In November, 1854, Robert McLane, as commissioner, made several 'regulations,' which were duly transmitted to Congress by the President on the 15th of July, 1856.

"On the 12th of December, 1856, regulations made by Peter Parker, a successor of McLane, were also transmitted to Congress.

"William B. Reed was appointed commissioner on the 18th of April, 1857. His instructions, which were communicated to the Senate by the President on the 20th of April, 1858, directed him, by peaceful cooperation, to aid in the accomplishment of the objects which the allies were seeking 'to accomplish by treaty stipulations.'

"On the 10th of December, 1857, the President transmitted to Congress further regulations made by Parker on the 4th of March, 1857, for such revision as Congress might deem expedient. The Senate committee reported that these regulations needed no revision, and the Senate passed a resolution to that effect.

"On the 20th of December, 1858, the President transmitted to the Senate the correspondence of Commissioners McLane and Parker, but withheld the instructions of the Department to them. This document contains 1424 pages, and exhibits in detail the questions which had arisen with China during the period it covers.

"On the 27th of December, 1858, the President transmitted to Congress a decree, and a further regulation which had been made by Reed, who had been appointed minister plenipotentiary.

"The instructions of the Department of State to McLane and Parker, which were withheld from the public in 1858, were communicated to the Senate in 1860. With the instructions to Parker the President also transmitted to Congress a mass of correspondence (624 printed pages) relating largely to the negotiations of the treaty of Tien-tsin in 1858. In 1857, Mr. Marcy thought that the 'British Government evidently had objects beyond those contemplated by the United States, and we ought not to be drawn along with it, however anxious it may be for our co-operation.' He writes to Parker on the 27th of February, 1857: 'The President does not believe that our relations with China warrant the "last resort" you speak of. * * * The "last resort" means war.' But in the following May, Mr. Cass, the Secretary of State, directs Reed to co-operate peacefully with the allied powers for the objects named in his dispatch.

"It being proposed in Congress to change or modify the act of 1848, Mr. Cass addressed a communication on the subject to the chairman of the Senate Committee of Foreign Relations. Congress passed the act June 22, 1860.

"Mr. Burlingame, in June, 1863, being the representative of the United States in China, wrote to Mr. Seward: 'In my dispatch No. 18, of June 2, 1862, I had the honor to write, if the treaty powers could agree among themselves to the neutrality of China, and together secure order in the treaty ports, and give their moral support to that party in China in favor of order, the interests of humanity would be subserved. Upon my arrival at Peking I at once elaborated my views, and found, upon comparing them with those held by the representatives of England and Russia, that they were in accord with theirs.'

"On the 15th of June, 1864, Burlingame instructed the consul-general at Shanghai respecting 'the extent of the rights and duties of American citizens under the treaty, and the regulations made in pursuance thereof;' and he added, 'I have submitted the above letter to the British, French, and Russian ministers, and they authorize me to inform you they entirely approve its views and policy.' Burlingame described the policy he was prescribing as 'an effort to substitute fair diplomatic action in China for force.' When this important action was communicated to Mr. Seward, Secretary of State, he wrote, 'It is approved with much commendation.'

"On the 9th of November, 1664, Burlingame transmitted to the Department further rules and regulations for consular courts. Seward replied that the dispatch would 'be submitted to Congress.'

"In 1866 Burlingame submitted for approval 'land regulations' for the regulation and the government of the European colony (the French excepted) at Shanghai. In 1868 the powers agreed upon rules for joint investigation, under the treaty, in cases of confiscation and fine by the custom-house authorities.

"In the summer of 1868 a legation from China arrived at Washington, with Burlingame (who had left the service of the United States) as its

chief. The treaty of 1868 was then concluded between them and the United States.

"There being some delay in the ratification of that treaty on the part of China, Mr. Fish instructed Mr. Bancroft, the minister of the United States at Berlin thus: 'You will undoubtedly meet Mr. Burlingame * * * in Berlin. * * * Impress upon him the importance to China of an early ratification of the treaties. * * * While the President cordially gives his adhesion to the principles of the treaty of 1868, * * * yet he earnestly hopes that the advisers of His Majesty the Emperor may soon see the way clear to counseling the granting of some concessions.'

"In 1870 Congress enacted that the superior judicial authority conferred by the act of 1860 on consuls-general or consuls, should be vested in the Secretary of State, and that in certain cases appeals should lie from the judgment of consular courts to the district court of the United States for the district of California.

"In an opinion dated September 19, 1855, Attorney-General Cushing reviews at length the effect of the statutes of 1848, and the extent of the judicial authority it confers upon consuls.' Attorney-General Black held that it was limited to the ports mentioned in the treaty.

"The expenses of transporting prisoners held for trial from one port in China to another are a lawful charge upon the general appropriations for defraying the judicial expenses of the Government in the absence of specific appropriations for the purpose.

"In November, 1858, Commissioner Reed, on behalf of the United States, accepted five hundred thousand taels ($735,238.97) in full satisfaction of the claims of citizens of the United States against China. In the following March Congress passed an act providing for the custody of the money, and authorizing the President to appoint commissioners to examine and audit the claims with a view to its distribution. (The manner in which this was done is set forth in detail in House Ex. Doc. 29, 3d sess. 40th Cong.) After the payment of the awards in full the remainder of the money was remitted to the Department of State. It has been the subject of several reports from the Secretary of State, and of some discussions in Congress, but there has been no legislative action respecting it."

Mr. J. C. B. Davis, Notes, &c.

"During the administration of President Tyler, Caleb Cushing, as plenipotentiary, negotiated a treaty by which political relations were for the first time established between the United States and the Emperor of China. In this treaty, the rights of extraterritoriality were stated in unmistakable terms. 'Citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the consul or other public functionary of the United States thereto authorized, according to the law of the United States. All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own Government.'"

Ibid.

The administration by consuls of the extraterritorial jurisdiction conferred by treaty is considered, *supra*, § 125.

(7) COLOMBIA AND NEW GRANADA.

§ 145.

President Monroe's message of Feb. 22, 1825, giving convention with Colombia concluded Oct. 3, 1824, with the documents appertaining thereto, is given in House Doc. 406, 18th Cong., 2d sess. 5 Am. St. Pap. (For. Rel.), 696.

The convention of Oct. 28, 1826, between the United States and the Federation of the Center of America, is given in 6 Am. St. Pap. (For Rel.), 269.

For a history of the diplomatic relations of the United States with the Government of Colombia, see report of Mr. Livingston, Sec. of State, to President Jackson, March 15, 1832. MSS. Report Book.

Distinctive questions as to the isthmus are hereafter discussed, *infra*, §§ 287 *ff.*

"Although this Government has always maintained that the three States of which the Republic of Colombia was composed are jointly and severally liable for the claims of our citizens against that Republic, yet from consideration for the condition of those States it was deemed advisable to reserve the application of this principle and to await the result of such arrangements as they might make among themselves for the adjustment of these claims. This was effected by the treaty between New Granada and Venezuela of the 23d of December, 1834, which was subsequently acceded to by Ecuador. Pursuant to that treaty New Granada became responsible for fifty, Venezuela for twenty-eight and a half, and Ecuador for twenty-one and a half per cent. of the debts of the Republic of Colombia. Upon this basis New Granada and Venezuela have both paid their proportion of the claims in the cases of the Josephine and Ranger."

Mr. Buchanan, Sec. of State, to Mr. Livingston, May 13, 1848. MSS. Inst., Ecuador.

An historical sketch of the relations of the United States with the federation of Central America is given in instructions of Mr. Buchanan, Sec. of State, to Mr. Hise, June 3, 1848; Mr. Clayton, Sec. of State, to Mr. Squier, May 1, 1849. MSS. Inst., Am. St.

"The obligations we have assumed (by the guarantee of the neutrality of the Isthmus) give us a right to offer, unasked, such advice to the New Granadian Government, in regard to its relations with other powers, as might tend to avert from that Republic a rupture with any nation which might covet the Isthmus of Panama.

Mr. Clayton, Sec. of State, to Mr. Foote, July 19, 1849. MSS. Inst., Colombia.

The United States will not assent to a capitation tax by the New Granada Government on citizens of the United States crossing the Isthmus.

Mr. Clayton, Sec. of State, to Mr. Foote, Jan. 9, 1850. MSS. Inst., Colombia.
Mr. Marcy, Sec. of State, to Mr. Green, Feb. 16, 1854; *ibid.*

Nor will assent be given to the requirement by New Granada of transit passports from such citizens.

Mr. Clayton, Sec. of State, to Mr. Foote, April 13, 1850. MSS. Inst., Colombia. See also Mr. Marcy to Mr. Green, Feb. 16, 1854; Mr. Marcy to Mr. Bowlin, Aug. 31, 1855; *ibid.*

Under the treaty of 1846 with New Granada the United States has the right to send over the Isthmus of Panama persons in its employment in both the civil and the military service.

Mr. Marcy, Sec. of State, to Mr. Paredes, June 20, 1853. MSS. Notes, Colombia. Same to same Oct. 12, 1853; *ibid.*

In 1829 the former Republic of Colombia was dismembered, and from that state arose the three Republics of New Granada, Venezuela, and Ecuador. By a treaty between the first two of these states, of the 23d December, 1834, New Granada was made responsible for 50, Venezuela for 28½, and Ecuador for 21½ per cent. of the debts of the Republic of Colombia.

Mr. Marcy, Sec. of State, to Mr. Green, Feb. 3, 1854. MSS. Inst., Colombia.

"This state of insecurity is very prejudicial to both countries, and it is not doubted that when properly urged upon the consideration of New Granada that Government will take prompt and effectual measures to insure to the citizens of the United States the most ample protection for their persons and property on the isthmus within its territory. This is not only a duty of national obligation, but is expressly provided for in the treaty of 12th of December, 1846, between the United States and New Granada. The United States must have the free, safe, and uninterrupted transit for those citizens and for public and private property across the Isthmus of Panama to the full extent contemplated by that treaty, and this Government looks with confidence for the security of this right, and does not expect that any necessity will arise for the use of any other means for the secure enjoyment of it but an appeal to the State of New Granada to fulfill its treaty stipulations upon that subject. The United States may reasonably expect, after what has happened, that New Granada will station such a force along the route of the railroad and at Aspinwall and Panama as will secure adequate protection to the persons and property of the citizens of the United States."

Mr. Marcy, Sec. of State, to Mr. Bowlin, June 4, 1856. MSS. Inst., Colombia.

The Government of the United States will not submit to an exorbitant local taxation of its mail matter passing over the isthmus railroad.

Mr. Marcy, Sec. of State, to Mr. Bowlin, July 3, 1856; to Mr. Morse and Mr. Bowlin, Dec. 3, 1856. MSS. Inst., Colombia. See also instructions of Mr. Cass, Sec. of State, to Mr. Jones, April 30, 1859; *ibid.*

On December 3, 1856, Mr. Marcy, Secretary of State, transmitted to Messrs. Morse and Bowlin, commissioners, a draft of a convention with New Granada, giving the United States, on payment of a money equiva-

lent, the protectorate of the Isthmus, so far as concerns transit, agreeing "to satisfy foreign powers that it would be kept open for their common use on fair terms," and that they should be asked to join in a guarantee for the neutrality of that part of the Isthmus. "The arrangement does not propose a full cession of the sovereign rights of New Granada over the territory included in the two municipalities, though it is, to a considerable extent, a restriction upon those rights. This arrangement is not, it is believed, of an unusual character. In organizing the General Government of the United States the several States reserved to themselves a large portion of their original sovereign rights." It was also proposed that the United States should acquire control of the island of Taboga, and some other small islands in the harbor of Panama. For these concessions $1,800,000 was the highest sum to be offered, from which were to be deducted $400,000, to be paid citizens of the United States in satisfaction of their claims on New Granada.

MSS. Inst., Colombia.

That the Government of New Granada declined "to negotiate upon the questions at issue," see Mr. Marcy to Mr. Bowlin, Apr. 17, 1857; *ibid.*

The United States Government will resist, by its naval forces at Aspinwall and Panama, any forcible attempt by New Granada to lay a tonnage tax on vessels of the United States at those ports, such tax being in violation of treaty obligations.

Mr. Marcy, Sec. of State, to Mr. Bowlin, Dec. 31, 1856. MSS. Inst., Colombia. See instructions of Mr. Cass to Mr. Jones, April 30, 1859, *ibid.*, where the history and conditions of the tax in question are elaborately given, and where the question is remitted anew to negotiation. This resumption of negotiation came from the agreement of New Granada to submit, by the treaty of September 10, 1857, all claims by citizens of the United States, to arbitration.

As to tonnage duties on the isthmus, see further Mr. Marcy, Sec. of State, to Mr. Herran, Dec. 12, 1856. MSS. Notes Colombia. Mr. Cass to Mr. Herran, Sept. 10, 1857; same to same, June 4, 1858; *ibid.*

A joint guarantee by the United States in common with other powers of the neutrality of the Isthmus of Panama is inconsistent with the policy of the United States.

Mr. Cass, Sec. of State, to Lord Napier, Sept. 10, 1857. MSS. Notes, Gr. Brit.

And so with a joint arrangement for the enforcement of neutrality laws.

Same to same, Oct. 20, 1857; *ibid.*

"Under our treaty with New Granada of the 12th December, 1846, we are bound to guaranty the neutrality of the Isthmus of Panama, through which the Panama railroad passes, 'as well as the rights of sovereignty and property which New Granada has and possesses over the said territory.' This obligation is founded upon equivalents granted by the treaty to the government and people of the United States.

"Under these circumstances, I recommend to Congress the passage of an act authorizing the President, in case of necessity, to employ the land and naval forces of the United States to carry into effect this guarantee of neutrality and protection. I also recommend similar legislation for the security of any other route across the isthmus in which we may acquire an interest by treaty."

President Buchanan, First Annual Message, 1857.

"A guarantee for the general use and security of a transit route, and also for its neutrality, is a desirable measure, which would meet the hearty concurrence of the United States. These views have already been made known to the Governments of Costa Rica and Nicaragua, and they have been informed 'that the President indulges the hope that these routes may be considered by general consent as neutral highways for the world, not to be disturbed by the operations of war.' These great avenues of intercommunication are vastly interesting to all the commercial powers, and all may well join in securing their freedom and use against those dangers to which they are exposed from aggression or outrages originating within or without the territories through which they pass.

"But the establishment of a political protectorate by any of the powers of Europe over any of the independent states of this continent, or, in other words, the introduction of a scheme of policy which would carry with it a right to interfere in their concerns, is a measure to which the United States have long since avowed their opposition, and which, should the attempt be made, they will resist by all the means in their power. The reasons for the attitude they have assumed have been fully promulgated, and are everywhere well known. There is no need upon this occasion to recapitulate them; they are founded on the political circumstances of the American continent, which has interests of its own, and ought to have a policy of its own, disconnected from many of the questions which are continually presenting themselves in Europe concerning the balance of power and other subjects of controversy arising out of the condition of its states, and which often find their solution or their postponement in war. It is of paramount importance to the states of this hemisphere that they should have no entangling union with the powers of the Old World, a connection which would almost necessarily make them parties to wars having no interest for them, and which would often involve them in hostilities with the other American states, contiguous or remote. The years which have passed by since this principle of separation was first announced by the United States have served still more to satisfy the people of this country of its wisdom, and to fortify their resolution to maintain it, happen what may. * * *

"The progress of events has rendered the interoceanic routes across the narrow portions of Central America vastly important to the com-

mercial world, and especially to the United States, whose possessions, extending along the Atlantic and Pacific coast demand the speediest and the easiest modes of communication. While the just rights of sovereignty of the States occupying this region should always be respected, we shall expect that these rights will be exercised in a spirit befitting the occasion and the wants and circumstances that have arisen. Sovereignty has its duty as well as its rights, and none of these local Governments, even if administered with more regard to the just demands of other nations than they have been, would be permitted in a spirit of Eastern isolation to close these gates of intercourse on the great highways of the world, and justify the act by the pretension that these avenues of trade and travel belong to them, and that they choose to shut them, or, what is almost equivalent, to encumber them with such unjust regulations as would prevent their general use."

Mr. Cass, Sec. of State, to Mr. Lamar, July 25, 1858. MSS. Inst., Am. St.

"This Government feels a deep interest in all the ways of communication between the Atlantic and Pacific, and if a railroad can be authorized and made across the Isthmus of Chiriqui, without any interference with existing rights or any violation of the good faith of New Granada, the President is of opinion that it would be of great value to commerce, and of especial value to the United States. He would, therefore, be glad to render it any proper assistance within his reach. Yet he desires, also, that the Panama road should continue its career of usefulness and prosperity, and should obtain all suitable facilities from New Granada for the prosecution and extension of its great and increasing traffic. In any conflict of interest between the two companies it is not our duty to interfere. We wish them both success, and, in the opinion of the Attorney-General, there is good reason to believe that this success may be accomplished without any material conflict between them."

Mr. Cass, Sec. of State, to Mr. Jones, May 4, 1860. MSS. Inst., Colombia.

In the instructions of Mr. Seward, Secretary of State, to Mr. Burton, February 27, 1862, he says: "I have examined the instructions of my predecessors, Secretaries Cass and Marcy, and I find no reason for reversing the policy so distinctly assumed and so forcibly maintained by them, in reference to the tonnage and other taxes imposed upon American commerce at the Isthmus of Panama."

MSS. Inst. Colombia.

As to guarantee of Panama neutrality see Mr. Seward, Sec. of State, to Mr. Adams, July 11, 1862. MSS. Inst., Gr. Brit.

"In 1856 the naval officer in command of our Pacific squadron received orders to resist by force, if necessary, the collection of the tonnage taxes which this Government declared to be illegal. I refer you to Mr. Marcy's No. 29 of 31st December, 1856, to Mr. Bowlin, upon this point. I will send your No. 13 with its accompaniments and with a copy

of this instruction to the Navy Department, with a request that, if a renewal of the orders of 1856 be requisite, in view of the lapse of time and change in the personnel of officers in command, such measures may be taken as will secure the protection of the interests of our citizens on the isthmus, to which they are entitled under the solemn guaranties of the Government of New Granada."

Mr. Seward, Sec. of State, to Mr. Burton, Feb. 27, 1862. MSS. Inst., Colombia.

"The question which has recently arisen under the 35th article of the treaty with New Granada, as to the obligation of this Government to comply with a requisition of the President of the United States of Colombia for a force to protect the Isthmus of Panama from invasion by a body of insurgents of that country, has been submitted to the consideration of the Attorney-General. His opinion is, that neither the text nor the spirit of the stipulation in that article by which the United States engages to preserve the neutrality of the Isthmus of Panama, imposes an obligation on this Government to comply with a requisition like that referred to. The purpose of the stipulation was to guarantee the Isthmus against seizure or invasion by a foreign power only. It could not have been contemplated that we were to become a party to any civil war in that country by defending the Isthmus against another party. As it may be presumed, however, that our object in entering into such a stipulation was to secure the freedom of transit across the Isthmus, if that freedom should be endangered or obstructed, the employment of force on our part to prevent this would be a question of grave expediency to be determined by circumstances. The Department is not aware that there is yet occasion for a decision upon this point."

Mr. Seward, Sec. of State, to Mr. Burton Nov. 9, 1865. MSS. Inst, Colombia.

Mr. Seward's observations on the proposed convention with the United States of Colombia as to a ship canal across the Isthmus will be found in his instruction to Mr. Sullivan, Sept. 17, 1868. MSS. Inst., Colombia.

"I have had the honor to receive your note of yesterday stating that you had received instructions to solicit the issue of such orders as may be thought necessary to the end that Colombian vessels may be treated in the ports of the United States to which they may convey merchandise, when the latter does not proceed from any other port of the United States in the same ocean, in the same manner as American vessels employed in the same trade. Your note further adverts to the fact that the privilege desired was secured by the treaty between the United States and New Granada of the 12th of December, 1846.

"In reply I have to state that, as your request seems to imply an opinion on the part of your Government that the treaty adverted to has been definitively terminated, it is deemed advisable to hold the application under consideration until no doubt shall remain upon that point. The 35th article of the treaty stipulates that it shall last for twenty years from the exchange of ratifications, which took place on

the 10th of June, 1848. The same article further provides, 'Notwithstanding the foregoing, if neither party notifies to the other its intention of reforming any of or all the articles of this treaty, twelve months before the expiration of the twenty years stipulated above, the said treaty shall continue binding on both parties, beyond the said twenty years, until twelve months from the time that one of the parties notifies its intention of proceeding to a reform.'

"It appears that under date the 23d of January, 1867, General Salgar, then accredited to this Government as envoy extraordinary and minister plenipotentiary of the United States of Colombia, addressed to this Department a note from New York, in which he stated that he had been instructed to set on foot a negotiation for the purpose of renewing the treaty prior to the termination fixed in the 35th article.

"The receipt of this note was acknowledged in one from the Department of the 29th of January.

"With another note of the 23d of April, 1867, General Salgar transmitted a copy of the changes which his Government desired in the treaty, and offered to discuss the subject at such time as might be appointed for that purpose.

"It does not appear that any reply was made to the last-mentioned note, or that the discussion proposed by General Salgar took place. There is also nothing on record or on file here to show that the notes of General Salgar referred to were regarded and received as such a termination of the treaty as that for which the instrument itself provides.

"Nor does it appear that the Secretary of the Treasury of the United States has been informed that the treaty is at an end, and, therefore, that the privileges previously enjoyed under it by Colombia, in the ports of the United States must be discontinued. Indeed, so far as this Department is aware, those privileges, including the one requested by Mr. Perez, are still enjoyed by Colombian vessels and their cargoes. In any event, before a definitive answer can be given to your application, or your request can be complied with, it will be necessary for you to state that, from your own knowledge, a similar privilege is enjoyed by vessels of the United States and their cargoes in the ports of Columbia."

Mr. Fish, Sec. of State, to Mr. Perez, Feb. 8, 1871. MSS. Notes, Colombia; For. Rel., 1871.

"Your note of the 15th ultimo, relative to the treaty between the United States and New Granada of the 12th of December, 1846, was duly received. Almost ever since, however, my attention has been so engrossed by other important business that it has been impracticable to secure the leisure necessary to arrive at a satisfactory conclusion upon that subject. Now, however, I am happy to be able to announce that although literally and technically, pursuant to the clause of the 35th article of that instrument upon the subject, this Government might

hold that the application made by General Salgar for a revision of the treaty, in anticipation of a lapse of the time fixed for its termination, might be held to have brought about that result, the intentions of the parties at the time may, as you observe, be allowed to govern the question. General Salgar in his notice did not say that if his proposition should not be accepted the Colombian Government would regard the treaty as at an end, and Mr. Seward does not appear to have received that proposition as a formal notice of termination. His silence upon the subject may fairly be construed as indicative of an opinion on his part that, so far as the interests of the United States were concerned, no change in the treaty was required, and the form of the application of Colombia may also be construed to imply that, although she might prefer the changes proposed in that application, she did not regard them as indispensable to its continuance. Under these circumstances it may be said to comport with the interests of both parties to look upon the treaty as still in full force, but as subject to revision or termination in the form and upon the terms stipulated.

"The instrument, upon the whole, is believed to have been mutually advantageous. It is true that the flag of Colombia may not have as often been seen in the ports of the United States as that of the latter in the ports of Colombia. This, however, should not be imputed to any defect in the treaty, but rather to the different circumstances of the two countries. A principal object of New Granada in entering into the treaty is understood to have been to maintain her sovereignty over the Isthmus of Panama against any attack from abroad. That object has been fully accomplished. No such attack has taken place, though this Department has reason to believe that one has upon several occasions been threatened, but has been averted by warning from this Government as to its obligation under the treaty. This Government has every disposition to carry the treaty into full effect. If, in the opinion of Colombia, the Executive of the United States should have insisted upon a construction of the clause prohibiting the coasting trade of one country to the vessels of the other, incompatible with that equality in matters of trade and navigation which other articles of the instrument promise, the merchants of Colombia may, on proper application to the courts of the United States, have their rights under the treaty vindicated.

"We heartily desire any practicable and advantageous increase in the commercial intercourse between the two countries, and are by no means so selfish as to prefer that this should be carried on exclusively under the flag of the United States, especially if we should have promised that Colombia may share therein on equal terms. Recent events, which it is needless to particularize, may have made the transit of the Isthmus of Panama less indispensable to communication between the Territories of the United States on the Atlantic and those on the Pacific than when the treaty was concluded. Similar events, however, may, it is hoped,

soon impart increased activity to other traffic between the United States and Colombia to the mutual advantage of both countries."

Mr. Fish, Sec. of State, to Mr. Perez, May 27, 1871. MSS. Notes, Colombia; For. Rel., 1871.

As to isthmus, see *infra*, §§ 287, *ff.*

"This Government, by the treaty with New Granada of 1846, has engaged a guarantee of neutrality of the Isthmus of Panama. This engagement, however, has never been acknowledged to embrace the duty of protecting the road across it from the violence of local factions. Although such protection was of late efficiently given by the force under the command of Admiral Almy, it appears to have been granted with the consent and at the instance of the local authorities. It is, however, regarded as the undoubted duty of the Colombian Government to protect the road against attacks from local insurgents. The discharge of this duty will be insisted upon."

Mr. Fish, Sec. of State, to Mr. Keeler, Oct. 27, 1873. MSS. Dom. Let.

"This Department deems it important, in the interest of general commerce, and especially of the carrying trade of that route, that these disturbances should be guarded against. By the treaty with New Granada of 1846 this Government has engaged to guarantee the neutrality of the Isthmus of Panama. This engagement, however, has never been acknowledged to embrace the duty of protecting the road across it from the violence of local factions; but it is regarded as the undoubted duty of the Colombian Government to protect it against attacks from local insurgents."

Mr. Fish, Sec. of State, to Mr. Scruggs, Oct. 29, 1873. MSS. Inst., Colombia.

By a diplomatic arrangement between the representatives of the United States, Germany, France, and Great Britain, with the secretary of foreign affairs of Colombia in 1876, it was agreed that until the statute prescribing deposit of papers of vessels entering Colombian ports with the local Colombian authorities should be modified by the Colombian Congress, such papers "should be deposited with the consul of the respective nation, or, in the absence of such consul, with the consul of a friendly power." This agreement is still in force.

Mr. Evarts, Sec. of State, to Mr. Dichman, July 26, 1878. MSS. Inst., Colombia. See Mr. Evarts to Mr. Dichman, Feb. 4, 1879, as to the persistence of Colombia in the obnoxious statute.

As to convention of 1878 between the Colombian Government and the Civil Inter-oceanic Canal Company, see inquiries of Mr. Evarts, Sec. of State, to Mr. Dichman, July 20, 1878. MSS. Inst., Colombia.

Our guarantee of neutrality to the Isthmus of Panama furnishes no ground for any action by this Government in restraint of the transportation of munitions of war to belligerents in a war as to which our Government is neutral.

Mr. Evarts, Sec. of State, to Mr. Sherman, Nov. 14, 1879. MSS. Dom. Let.

"Diplomatic intercourse with Colombia is again fully restored by the arrival of a minister from that country to the United States. This is especially fortunate in view of the fact that the question of an interoceanic canal has recently assumed a new and important aspect, and is now under discussion with the Central American countries through whose territory the canal, by the Nicaragua route, would have to pass. It is trusted that enlightened statesmanship on their part will see that the early prosecution of such a work will largely inure to the benefit, not only of their own citizens and those of the United States, but of the commerce of the civilized world. It is not doubted that should the work be undertaken under the protective auspices of the United States and upon satisfactory concessions for the right of way, and its security, by the Central American Governments, the capital for its completion would be readily furnished from this country and Europe, which might, failing such guarantees, prove inaccessible."

President Hayes, Third Annual Message, 1879.
As to isthmus, see *infra*, §§ 287, *ff.*

The grant by the Colombian authorities to the United States of a right to establish coaling stations in certain ports on Colombian waters, may be asked by the United States as a matter of international courtesy.

Mr. Evarts, Sec. of State, to Mr. Dichman, April 19, 1880. MSS. Inst., Colombia.

"By the treaty of 1846 the United States are guarantors of the neutrality of any interoceanic canal through the Isthmus of Panama, and of the sovereignty of the Republic of Colombia over the territory through which it passes. If we are rightfully informed, no other Government has been willing to come into any such treaty relations with Colombia, and to-day such a canal by whomsoever completed would need to rest upon this stipulated protection of the United States, and should the United States recognize their rights under this concession, both its projectors and the Government of Colombia would be authorized under certain contingencies to call upon and be wholly dependent upon this Government for the fulfillment of this obligation. Under such circumstances the United States would have considered it as the manifestation of a just and friendly spirit if the Government of Colombia had furnished us timely information of the proposed concession, and thus enabled us to judge whether the conditions under which our guarantee had been made had been preserved with due consideration both of the rights which that guarantee confers and the obligations which it imposes. * * *

"But it cannot be overlooked that by the 35th article of the treaty of 1846 the United States has not only, 'in order to secure to themselves the tranquil and constant enjoyment' of the advantages of that treaty, undertaken to 'guarantee positively and efficaciously to New Granada'

'the perfect neutrality of the before-mentioned Isthmus,' but they have further obliged themselves to 'also guarantee in the same manner the rights of sovereignty and property which New Granada has and possesses over the said territory.' While, therefore, the United States have perfect confidence in these representations, as well as in the strong friendship of the French Government, it can scarcely be denied that such a concession to foreign subjects would introduce new questions of relative rights and interests affecting both the sovereign and proprietary rights of the Government of Colombia and such as would seriously enlarge the responsibilities of our treaty guarantee; and this Government feels that it is not unreasonable in expecting that any concession involving such consequences should be a subject of joint consideration by, and that its details can scarcely be settled without a preliminary agreement between, the Governments of Colombia and the United States as to their effect upon existing treaty stipulations."

Mr. Evarts, Sec. of State, to Mr. Dichman, Apr. 19, 1880. MSS. Inst., Colombia.

"It is, however, deemed prudent to instruct you, with all needful reserve and discretion, to intimate to the Colombian Government that any concession to Great Britain or any other foreign power, looking to the surveillance and possible strategic control of a highway of whose neutrality we are the guarantors, would be looked upon by the Government of the United States as introducing interests not compatible with the treaty relations which we maintain with Colombia."

Mr. Evarts, Sec. of State, to Mr. Dichman, July 31, 1880. MSS. Inst., Colombia.

"The relations between this Government and that of the United States of Colombia have engaged public attention during the past year, mainly by reason of the project of an interoceanic canal across the Isthmus of Panama, to be built by private capital under a concession from the Colombian Government for that purpose. The treaty obligations subsisting between the United States and Colombia, by which we guarantee the neutrality of the transit and the sovereignty and property of Colombia in the Isthmus, make it necessary that the conditions under which so stupendous a change in the region embraced in this guarantee should be effected—transforming, as it would, this isthmus, from a barrier between the Atlantic and Pacific Oceans, into a gateway and thoroughfare between them for the navies and the merchant ships of the world—should receive the approval of this Government, as being compatible with the discharge of these obligations on our part, and consistent with our interests as the principal commercial power of the Western Hemisphere. The views which I expressed in a special message to Congress in March last, in relation to this project, I deem it my duty again to press upon your attention. Subsequent consideration has but confirmed the opinion 'that it is the right and duty of the United States

to assert and maintain such supervision and authority over any interoceanic canal across the isthmus that connects North and South America as will protect our national interests."

President Hayes, Fourth Annual Message, 1880.

For projected treaty as to guarantee of Isthmus between the United States and Colombia, see Mr. Evarts, Sec. of State to Mr. Dichman, Feb. 5, 1881. MSS. Inst., Colombia.

"You will receive herewith a copy of a memorandum indicating the subject and scope of a conference between the Colombian minister and myself in relation to certain projects of treaty which have been considered by us. You are already advised of the general situation of the subject as hitherto treated between this Government and that of Colombia.

"You will proceed to New York, and in an interview with the Colombian minister, who has been advised of your coming, you will, guided by this memorandum, submit to him the views of this Department.

"Should the result of your conference be an indication on his part of his authority and readiness to conclude a treaty upon the modifications suggested, you will inform him that I am prepared to renew our conferences upon that basis in the expectation of a conclusive arrangement. But if, as is more probable, you find that he considers himself only authorized to refer to his Government the views entertained between you, your object will be by free and frank consultation to ascertain how far his opinions and those expressed by me in the memorandum, promise the possibility of an accord upon the subjects embraced, which will justify positive instructions in that sense to the United States minister at Bogotá.

"You will bring or forward a report of your interview in the shape of a *précis* of the conversation between you.

"It is hoped that such a report can reach this Department in time for the next mail to Panama. But if you find this impossible, you will inclose a copy of such report in the letter addressed to Mr. Dichman, which is sent you with this, and mail the letter and inclosure so as to secure its transmission from New York by the mail which leaves immediately after your interview with the Colombian Minister."

Mr. Evarts, Sec. of State, to Mr. Trescot, Feb. 15, 1881. MSS. Inst., Colombia. For Rel., 1881.

By the protocol of February 17, 1881, signed by General Domingo, representing the Colombian Government, and Mr. Trescot, representing Mr. Evarts, Secretary of State, "the United States Government has not abandoned its right to insist that as guarantor of the neutrality of transit and sovereignty of Colombia over isthmian territory its consent was and will be necessary to the validity of any concession which might affect the conditions of the guarantee, but it has simply, presently ac-

cepted such a practical recognition of its rights as guarantor as will enable the Government to maintain its rights under the treaty of 1846 whenever the necessity for such maintenance shall arise, and you will govern any representations you may make accordingly. This will leave for further consideration the value and importance of requiring a firm stipulation that no new concession or modification of concession can be made without the concurrent approval of its terms by the United States as not objectionable treatment of the subject of our treaty engagements with Colombia—that is to say the Isthmus of Panama and interoceanic communication."

Mr. Evarts, Sec. of State, to Mr. Dichman, Feb. 18, 1881. MSS. Inst., Colombia.

"The United States recognizes a proper guarantee of neutrality as essential to the construction and successful operation of any highway across the Isthmus of Panama, and in the last generation every step was taken by this Government that is deemed requisite in the premises. The necessity was foreseen and abundantly provided for, long in advance of any possible call for the actual exercise of power.

"In 1846 a memorable and important treaty was negotiated and signed between the United States of America and the Republic of New Granada, now the United States of Colombia. By the 35th article of that treaty in exchange for certain concessions made to the United States we guaranteed 'positively and efficaciously' the perfect neutrality of the Isthmus and of any interoceanic communications that might be constructed upon or over it for the maintenance of free transit from sea to sea; and we also guaranteed the rights of sovereignty and property of the United States of Colombia over the territory of the Isthmus as included within the borders of the State of Panama.

"In the judgment of the President this guarantee, given by the United States of America, does not require reinforcement, or accession, or assent, from any other power. In more than one instance this Government has been called upon to vindicate the neutrality thus guaranteed, and there is no contingency now foreseen or apprehended in which such vindication would not be within the power of this nation. * * *

"The great European powers have repeatedly united in agreements, such as guarantees of neutrality touching the political condition of states like Luxembourg, Belgium, Switzerland, and parts of the Orient, where the localities were adjacent, or where the interests involved concerned them nearly and deeply. Recognizing these facts the United States has never offered to take part in such agreements, or to make any agreements supplementary to them. While thus observing the strictest neutrality with respect to complications abroad, it is the long settled policy of this Government that any extension to our shores of the political system by which the great powers have controlled and de-

termined events in Europe would be attended with danger to the peace and welfare of this nation."

Mr. Blaine, Sec. of State, to Mr. Lowell, June 24, 1881. MSS. Inst., Gr. Brit.; For. Rel.

"The questions growing out of the proposed interoceanic waterway across the Isthmus of Panama are of grave national importance. This Government has not been unmindful of the solemn obligations imposed upon it by its compact of 1846 with Colombia, as the independent and sovereign mistress of the territory crossed by the canal, and has sought to render them effective by fresh engagements with the Colombian Republic looking to their practical execution. The negotiations to this end, after they had reached what appeared to be a mutually satisfactory solution here, were met in Colombia by a disavowal of the powers which its envoy had assumed, and by a proposal for renewed negotiation on a modified basis.

"Meanwhile this Government learned that Colombia had proposed to the European powers to join in a guarantee of the neutrality of the proposed Panama Canal—a guarantee which would be in direct contravention of our obligation as the sole guarantor of the integrity of Colombian territory and of the neutrality of the canal itself. My lamented predecessor felt it his duty to place before the European powers the reasons which make the prior guarantee of the United States indispensable, and for which the interjection of any foreign guarantee might be regarded as a superfluous and unfriendly act.

"Foreseeing the probable reliance of the British Government on the provisions of the Clayton-Bulwer treaty of 1850, as affording room for a share in the guarantees which the United States covenanted with Colombia four years before, I have not hesitated to supplement the action of my predecessor by proposing to Her Majesty's Government the modification of that instrument and the abrogation of such clauses thereof as do not comport with the obligations of the United States toward Colombia, or with the vital needs of the two friendly parties to the compact."

President Arthur, First Annual Message, 1881.

As to continuance of imposition of Colombian law, requiring the deposit of foreign ships' papers at the isthmus ports, see instructions of Mr. Frelinghuysen, Sec. of State, to Mr. Scruggs, March 6, 1883, Inst., Colombia.

"Early in March last war broke out in Central America, caused by the attempt of Guatemala to consolidate the several States into a single Government. In these contests between our neighboring states the United States forbore to interfere actively, but lent the aid of their friendly offices in deprecation of war, and to promote peace and concord among the belligerents, and by such counsel contributed importantly to the restoration of tranquillity in that locality.

"Emergencies growing out of civil war in the United States of Colombia demanded of the Government at the beginning of this Admin-

istration the employment of armed force to fulfill its guarantees under the thirty-fifth article of the treaty of 1846, in order to keep the transit open across the Isthmus of Panama. Desirous of exercising only the powers expressly reserved to us by the treaty, and mindful of the rights of Colombia, the forces sent to the Isthmus were instructed to confine their action to 'positively and efficaciously' preventing the transit and its accessories from being 'interrupted or embarrassed.'

"The execution of this delicate and responsible task necessarily involved police control where the local authority was temporarily powerless, but always in aid of the sovereignty of Colombia. The prompt and successful fulfillment of its duty by this Government was highly appreciated by the Government of Colombia, and has been followed by expressions of its satisfaction. High praise is due to the officers and men engaged in this service. The restoration of peace on the Isthmus by the re-establishment of the constituted Government there being accomplished, the forces of the United States were withdrawn."

President Cleveland, First Annual Message, 1885. See App., vol. iii, § 145.

Colombian vessels are entitled, under the treaty with the United States, to make repairs in our ports when forced into them by stress of weather, but they cannot enlist recruits there, either from among our citizens or foreigners, except such as may be transiently within the United States.

2 Op., 4, Wirt, 1825.

The words of the treaty of 1846 with New Granada are not the test by which to determine what is or what is not within the true limits of the Isthmus of Panama, with reference to the exclusive right of a company to make a railroad across that isthmus. The act of the New Granadian Government conceding such exclusive right must be construed so as to give such company that right within the true geographical boundaries of the isthmus named.

9 Op., 391, Black, 1859.

The 35th article of the treaty of 1846 with New Granada binds the United States absolutely to guarantee the perfect neutrality of the Isthmus of Panama, on the demand of the proper party; and this obligation must be performed by any and all means which may be found lawful and expedient.

11 Op., 67, Bates, 1864.

But this article does not oblige this Government to protect the Isthmus of Panama from invasion by a body of insurgents from the United States of Colombia.

11 Op., 391, Speed, 1865.

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 with New Granada of 1857, and therefore conferred jurisdiction to determine what cases had been presented to, but not decided by, the old commission.

11 Op., 402, Speed, 1865.

The claim of R. W. Gibbes having been duly referred to the commissioners under the convention with New Granada of 1857 (Pub. Trs., 564), and submitted to the umpire, who reported an award during the existence of the commission, and payment having been suspended by request of the Secretary of State, and the case having been afterward referred, without the claimant's consent, to the commission under the convention with Colombia of 1864 (Pub. Trs., 158), as the representative of the late Republic of New Granada, it was held, that, by the submission of this claim to the latter commission in the manner stated, the claimant was not divested of his rights against New Granada under the award of the umpire aforesaid.

13 Op., 19, Hoar, 1869; see *infra*, § 221.

The award not having been vacated, opened, or set aside during the life-time of the former commission, and the claimant having done nothing since to waive his rights thereunder, it should be treated by our Government as a valid and conclusive ascertainment of his claim against New Granada.

13 Op., 19, Hoar, 1869.

By article 35 of the treaty of December 12, 1846, with New Granada, it was provided that the right of transit across the Isthmus of Panama "should be open and free to the Government and citizens of the United States; * * * nor shall the citizens of the United States be liable to any duties, tolls, or charges of any kind to which native citizens are not subjected, for thus passing the said isthmus." When gold was discovered in California in 1848, the isthmus became a great thoroughfare for citizens of the United States, and the State of Panama, a province of New Granada, began, in 1849, to levy a tax on all persons crossing the isthmus. It was held that this tax defeated the plain intent of the treaty, being actually, though not ostensibly, leveled at citizens of the United States and falling principally upon them.

13 Op., 547, Akerman, 1871.

This question was before the Washington Commission of 1865.

By the law passed by the provincial chamber of Panama captains of all vessels embarking or disembarking passengers in Panama were required to pay two dollars for each one of said passengers. The Pacific Mail Steamship Company, an American company, made a claim before the above commission, on the ground stated in the foregoing opinion. The claim was rejected by the umpire for want of jurisdiction. At that time the United States had never definitely or formally taken the posi-

tion that the tax was a violation of the treaty of 1846; and the supreme council of Colombia had rejected the claim of the steamship company upon the express ground that the law imposing the tax was not a violation of the treaty. Under these circumstances the umpire said, "Being of opinion, therefore, that the construction to be put on the treaty has not been settled by the proper authorities; that the Commission is not empowered to settle a question of such a nature, and that upon the decision of that question the right of the company to indemnity, if otherwise unobjectionable, must depend, I reject this claim, with the declaration that this award does not prejudice the rights of the claimants should the Government of the United States decide at any time hereafter that under the treaty of 1846 the imposition of the passenger tax constituted such a violation of its letter or spirit as to authorize a demand for redress.

Washington Commission, 1865. MSS. Dept. State.
As to isthmus, see further *infra*, §§ 287, *ff.*

"The convention with Colombia was the first of a long series of treaties of amity and commerce with the several American States of Spanish or Portuguese origin. It contained, in addition to most of the liberal provisions already noted, an agreement, which has since been incorporated into many other treaties, that infractions of the treaty by citizens of either party should not interrupt the harmony and good correspondence between the two nations. * * *

"In the year 1831 the Republic of Colombia separated into the three independent Republics of Ecuador, New Granada, and Venezuela; and New Granada in 1862 took upon itself the name of the United States of Colombia.

"It was while the territory bore the name of New Granada that the treaty of amity, commerce, and navigation, of December 12, 1846, was concluded.

"In 1866 some correspondence took place respecting the construction of the guarantee of the United States in the treaty of 1846. No result was reached.

"On the 23d of April, 1867, the minister of Colombia at Washington proposed to the Secretary of State to make certain changes in the existing treaty. At the time these proposals were made nineteen years had not expired from the date of the exchange of the ratifications of the treaty, and a question arose whether, under the thirty-fifth article of the treaty, they operated to terminate it. Mr. Perez, the Colombian minister at Washington, wrote Mr. Fish, April 15, 1871: 'Such documents cannot * * * be considered as a notification of the cessation of the treaty, and, in fact, they have hitherto not been so considered. In both countries the treaty has been and still is considered as being in force.' Mr. Fish replied, 'Although literally and technically, pursuant to the clause of the 35th article of that instrument upon the subject, this Government might hold that the application made by General Salgar for a revision of the treaty in anticipation of a lapse of the time fixed for its termination might be held to have brought about that result, the intentions of the parties at the time may, as you observe, be allowed to govern the question. General Salgar, in his notice, did not say that if his proposition should not be accepted the Colombian Government would regard the treaty as at an end, and Mr. Seward does not appear to have received that proposition as a formal notice of termination. His silence

upon the subject may fairly be construed as indicative of an opinion on his part that, so far as the interests of the United States were concerned, no change in the treaty was required, and the form of the application of Colombia may also be construed to imply that, although she might prefer the changes proposed in that application, she did not regard them as indispensable to its continuance. Under these circumstances it may be said to comport with the interests of both parties to look upon the treaty as still in full force, but as subject to revision or termination in the form and upon the terms stipulated.'"

Mr. J. C. B. Davis' Notes, &c.

It is to be observed that the word "neutrality" in the convention of 1846, is not used in the technical sense of "neutralization." "Neutralization," as is elsewhere seen, (*supra*, § 40; *infra*, § 150 *ff*,) is the assignment to a particular territory or territorial water of such a quality of permanent neutrality in respect to all future wars as will protect it from foreign belligerent disturbance. This quality can only be impressed by the action of the great powers by whom civilized wars are waged and by whose joint interposition such wars could be averted. As the "neutrality" of the Isthmus is, by the convention before us, guaranteed only by the United States, it is not a neutralization in the above sense, but only a pledge and guarantee of protection.

As to neutralization of Isthmian canal, see *infra*, § 150 *ff*.

(8) Costa Rica and Honduras.

§ 146.

"The settlement of the question respecting the port of San Juan de Nicaragua, and of the controversy between the Republics of Costa Rica and Nicaragua in regard to their boundaries, was considered indispensable to the commencement of the ship-canal between the two oceans, which was the subject of the convention between the United States and Great Britain of the 19th of April, 1850. Accordingly a proposition for the same purposes, addressed to the two Governments in that quarter, and to the Mosquito Indians, was agreed to in April last by the Secretary of State and the minister of Her Britannic Majesty. Besides the wish to aid in reconciling the differences of the two Republics, I engaged in the negotiation from a desire to place the great work of a ship-canal between the two oceans under one jurisdiction, and to establish the important port of San Juan de Nicaragua under the Government of a civilized power. The proposition in question was assented to by Costa Rica and the Mosquito Indians. It has not proved equally acceptable to Nicaragua, but it is to be hoped that the further negotiations on the subject which are in train will be carried on in that spirit of conciliation and compromise which ought always to prevail on such occasions, and that they will lead to a satisfactory result."

President Fillmore, Third Annual Message, 1852.

The guarantee to Honduras of neutrality of interoceanic communication does not imply "that the United States are to maintain a police or

other force in Honduras for the purpose of keeping petty trespassers from the railway."

Mr. Fish, Sec. of State, to Mr. Baxter, May 12, 1871. MSS. Inst., Honduras; For. Rel., 1871.

Mr. Fish, Sec. of State, to Mr. Torbert, Mar. 20, 1871. MSS. Inst., San Salvador; *ibid.*

As to submission by Costa Rica and the United States of Colombia of their difficulties to the arbitration of the King of Belgium, see letter of Mr. Blaine, Sec. of State, to Mr. Putnam, May 31, 1881. MSS. Inst., Belgium.

"Information has been received at this Department that the Republics of Costa Rica and the United States of Colombia have, by convention, agreed to refer certain differences on the question of boundaries to arbitration. The arbitrators named in the convention are, His Majesty the King of the Belgians, His Majesty the King of Spain, and his Excellency the President of the Argentine Republic, the arbitration being offered to each in the order named.

"I have reason to believe that the invitation to act as arbitrator extended to the King of the Belgians will be declined, and it is to be presumed that, according to the terms of the convention, a similar application will then be made to the King of Spain.

"The subject submitted to arbitration is the boundary line between the Republic of Costa Rica and the State of Panama, one of the constituent states of the United States of Colombia, and its decision must seriously affect the extent of the littoral territory of Panama, both on the Atlantic and the Pacific coast. As you are aware, by the thirty-fifth article of the treaty of 1846 between the United States of America and the United States of Colombia, the United States of America have not only guaranteed the neutrality of any interoceanic connection across the Isthmus of Panama, but also the sovereignty of the United States of Colombia in and over the state of Panama.

"This guarantee has now existed (and on more than one occasion been enforced) for thirty-five years. Under its protection all efforts for the execution of an interoceanic canal have hitherto been attempted, and the present enterprise so largely attracting the attention of the world, by whatever individuals it may be undertaken, is equally covered by the obligations and responsibilites of that guarantee. Any question which, by affecting the boundaries of the State of Panama, either enlarges or diminishes the rights or the obligations of the United States of America, under this guarantee, is of direct and practical interest to this Government.

"It has been, therefore, a matter of surprise to the Government of the United States of America that this convention has been negotiated between the two Republics without communication to us either of its purposes or methods.

"The Government of the United States of America recognizes the wisdom of such a mode of settlement for international differences, and is far from making any pretension to be the only or necessary arbiter to whom the Republics of South and Central America should appeal. In-

deed, I may go further and say that this Government can readily understand and appreciate the feeling which would induce the Spanish Republics of this continent to seek in the great monarchy from which they have derived their life, their language, and their laws, a sympathizing umpire. While, therefore, this Government has no dissatisfaction to express at the selection of His Majesty the King of Spain, it is only proper to avoid all possibility of future misunderstanding between His Majesty and the Government of the United States that His Majesty should be informed of the view of this convention entertained by the Government of the United States.

"This Government is of opinion that any question affecting the territorial limits of the State of Panama is to it one of direct practical concern, and that under the guarantee of the treaty of 1846 it is entitled to an active interposition in the solution of any such question, should it deem that its interests require such intervention; it further thinks that the convention providing for the arbitration should have been the subject of frank communication and friendly consultation with it on the part of the signatory powers.

"This Government will not interfere to prevent the accomplishment of such arbitration, nor does it undertake to express any opinion as to the acceptance by His Majesty the King of Spain of the invitation which has been tendered him. But it deems it due to itself and respectful to His Majesty to inform him in advance that the Government of the United States, where either its rights or interests are concerned, will not hold itself bound by any arbitration, where it has not been consulted on the subject or method of arbitration, and has had no voice in the selection of the arbitrator. Before you act upon the instruction now given, you will inform yourself whether such invitation has been or is about to be tendered to His Majesty, as I am informed the invitation has not yet been extended to His Majesty the King of the Belgians, and circumstances may therefore delay, if not entirely prevent, the reference to His Majesty the King of Spain. Should the contingency provided for, however, occur, you will take a proper opportunity to communicate to the secretary for foreign affairs the views which I have now expressed.

"In doing so you will carefully avoid anything in the nature of a protest, and will say that your communication is induced by the anxiety of this Government to avoid any misunderstanding or seeming disrespect of the decision which His Majesty may reach should he accept the arbitration."

Mr. Blaine, Sec. of State, to Mr. Fairchild, June 25, 1881. MSS. Inst., Spain; For. Rel., 1881.

Under the twelfth section of the act of 1861 (12 Stat., 147), to carry into effect the convention with Costa Rica of 1860, certified copies or duplicates of papers filed in the State Department, and not translations, must

be substituted by the commissioner of Costa Rica for the originals withdrawn by him.

10 Op., 450, Bates, 1863.

As to treaty of Great Britain with Honduras for neutralization of isthmus, see *supra*, § 40.

As to isthmus, see further *infra*, §§ 287, *ff*.

(9) DENMARK.

§ 147.

There being no express provision for the surrender of deserting seamen in the convention of 1826, between the United States and Denmark, the laws of the United States for the apprehension of deserters cannot be applied to deserters from a Danish vessel.

6 Op., 148, Cushing, 1853.

As to the negotiations with Denmark in reference to sound dues, see *supra*, § 29.

As to treaty for cession of Danish West Indies, see *supra*, § 61*a*.

As to the circumstances of this treaty, see Mr. James Parton's pamphlet on "The Danish Islands, are we bound to pay for them?" Boston, 1869.

The relations of Denmark to the United States, prior to the treaty of 1826, are discussed in 1 Lyman's Diplomacy of the United States, chap. xii.

"Quasi relations were opened with Denmark during the war of the Revolution by Dr. Franklin, who, on the 22d of December, 1779, in a letter to M. Bernstorff, minister for foreign affairs at Copenhagen, remonstrated against the seizure of American prizes within the territorial jurisdiction of the King of Denmark. This question lingered into the middle of the present century.

"On the 27th of February, 1783, the Danish minister for foreign affairs wrote a letter to Mr. de Walterstorf, one of his countrymen, in which he said: 'As I know you are on the point of making a tour to France, I cannot omit recommending to you to endeavor, during your stay at Paris, to gain as much as possible the confidence and esteem of Mr. Franklin. * * * You have witnessed the satisfaction with which we have learned the glorious issue of this war for the United States of America, and how fully we are persuaded that it will be for the general interests of the two states to form, as soon as possible, reciprocal connections of friendship and commerce. Nothing certainly would be more agreeable to us than to learn by your letters that you find the same dispositions in Mr. Franklin.'

"De Walterstorf went to Paris and made the acquaintance of Franklin, and assured him that the King had a strong desire to have a treaty of friendship and commerce with the United States. Franklin informed Robert Livingston of the advances, and suggested that Congress should send the necessary powers for entering into the negotiations, but nothing came of it. Franklin could not go on without a special power, and no special power came.

"It was not until 1826 that a commercial convention was concluded at Washington with Denmark. This was transmitted to Congress with President Adams's message at the beginning of the second session of the 19th Congress.

J. C. B. Davis, Notes, &c.

(10) FRANCE.

(*a*) TREATY OF 1778.

§ 148.

The treaty of alliance and that of amity and commerce were both dated on February 6, 1778. The treaty of alliance, after reciting that in the then pending war with Great Britain France and the United States were allies, provided that the "essential and direct end of the present defensive alliance" was to maintain the sovereignty and independence of the United States. This sovereignty and independence the King of France guaranteed to the United States forever. The United States, as an equivalent, guaranteed to the Crown of France all its then possessions in the West India Islands. The treaty proceeded as follows: "In order to fix more precisely the sense and application of the preceding articles, the contracting parties declare that in case of a rupture between France and England the reciprocal guarantee declared in the said articles shall have its full force and effect the moment such war shall break out."

The treaty of amity and commerce contained the following stipulations:

As between the parties free ships were to make free goods, except contraband of war, of which a limited list was appended. But enemy's ships, it was agreed, were to make enemy's goods.

In war the men-of-war or privateers of one ally were empowered to board the merchant ships of the other concerning which there was just ground of suspicion. But upon production of a sea-letter in a given form, specified at length, showing that the vessel was not infringing any provision of the treaty, she was at once to be released. In case the sea-letter disclosed the existence of contraband goods, the captors were strictly forbidden to break up the hatches or disturb the cargo, but were peaceably to take the vessel to port for adjudication. The existence of contraband goods on board was not to be considered as infecting the vessel or residue of the cargo. In case of confiscation of such goods, the vessel, with the residue of her cargo, was to be permitted to proceed upon her voyage.

The same duties, rights, and benefits were to be allowed in the ports of either ally as were allowed to the most favored nation.

While men-of-war and privateers of either ally were to be entitled freely to enter and leave the ports of the other with their prizes, men-of-war and privateers of an enemy of either ally were not to be fitted out in the ports of the other, nor could their prizes be brought into such ports for sale. Permission was to be given to the latter to enter the ports of either ally only when forced in by necessity, and they were to be obliged to retire therefrom as soon as possible.

The opinion of Mr. Jefferson, given to the President on April 18, 1793, assumes that the guarantee in the treaty with France of the West India Islands did not apply until we were called upon by France, and even then not until the islands were invaded or immediately threatened.

7 Jeff. Works, 615, *supra*, § 133. See 1 Lyman's Diplomacy of the U. S., 38, *ff.*

Mr. Jefferson, in a letter to Mr. Madison of May 19, 1793, states that when Genet presented his letters of credence, he said, "We know that under present circumstances we have a right to call upon you for the

guarantee of our islands. But we do not desire it. We wish you to do nothing but what is for your own good. Cherish your own peace and prosperity."

2 Randall's Jefferson, 140.

Mr. Hamilton, in the essays of Pacificus, published in exposition of General Washington's "neutrality" proclamation of 1793, took the ground that the "guarantee" clause between the United States and France was personal to Louis XVI, and did not apply to the revolutionary governments that succeeded the deposition of that monarch. "Louis the XVI," he argued, "though no more than the constitutional agent of the nation, had at the time the sole power of managing its affairs, the legal right of directing its will and its force. His will alone was active, that of the nation passive. If there was kindness in the decision, *demanding a return of good will*, it was the kindness of Louis XVI; his heart was the depository of the sentiment. Let the genuine voice of nature, then, imperverted by political subtleties, *pronounce whether the acknowledgment, which may be due for that kindness, can be equitably transferred from him to others who had no share in the decision.* * * * It would be to carry the principle (of permanency of treaty obligations) too far and render it infinitely too artificial to attribute to it the effect of transforming such a claim from the prince to the nation, by way of opposition and contrast." Mr. Hamilton, however, in maintaining this position stood almost alone. It has been held by a series of Administrations that our obligations to foreign powers, as well as our claims against them, survive the dynasties from which they took immediate rise, and follow through every change the nations whom these dynasties at the time represented. As a general rule, a treaty is not abrogated by a revolution in the country of one of the contracting parties.

See *infra*, §§ 240, 248; *supra*, § 137.
As to neutrality duties under such circumstances, see *infra*, § 401.

Mr. Madison, under the name of Helvidius, replied, that "a nation, by exercising the right of changing the organ of its will, can neither disengage itself from the obligations, nor forfeit the benefit of its treaties. This is a truth of vast importance, and happily rests with sufficient firmness on its own authority. To silence or prevent cavil I insert, however, the following extract: 'Since, then, such a treaty (a treaty not personal to the sovereign) directly relates to the body of the state, it subsists though the form of the republic happens to be changed, and though it should be even transformed into a monarchy—for the state and the nation are always the same, whatever changes are made in the form of government—and the treaty concluded with the nation remains in force as long as the nation exists.' (Vattel, B. II, § 85.) It follows that as a treaty, notwithstanding the change of a democratic government into a monarchy, continues in force with the new king, in like manner if a *monarchy* becomes a republic, the treaty made with the king does not expire on that account, 'unless it were manifestly personal.' (Burham, part iv, c. ix, c. 16.) As a change of government, then, makes no change in the obligations or rights of the party to a treaty, it is clear that the Executive (of the United States) can have no more right to suspend or prevent the operation of a treaty, on account of the change, than to suspend or prevent the operation where no such change has happened. Nor can it have any more right to suspend

the operation of a treaty in force as a law, than to suspend the operation of any other law."

See *supra*, § 137; *infra*, § 402. See also 1 Tucker's Life of Jefferson, 414, 421.

The 17th article of the treaty of alliance with France is discussed in a letter from Mr. Pickering, Secretary of State, to Mr. Adet, May 24, 1796, where it is held that "France has no claim of right to sell prizes in the ports of the United States, nor the latter in the ports of France."

MSS. Notes, For. Leg. 1 Am. St. Pap. (For. Rel.), 651.

The correspondence in 1796 of Mr. Pickering, Secretary of State, in respect to our relations with France, is given in 1 Am. St. Pap. (For. Rel.), 559 *ff.* It involves no principle of international law, consisting, on the part of Mr. Pickering, principally of a detailed vindication of the actions of the United States towards France.

"The act of July 7, 1798, annulling the treaties with France, was followed by an act of July 9, 1798, which, without any formal declaration of war, not only authorized the President to instruct the commanders of public armed vessels of the United States to capture any French armed vessel, such captured vessel with her apparel, guns, and appurtenances, with the goods and effects on board the same, being French property, to be brought into the United States, and proceeded against and condemned as forfeited; but the President was authorized to grant special commissions to private armed vessels which should have the same license and authority. 1 Stat. L., 578."

Lawrence's Wheaton (ed. 1863), 507. See *supra*, §§ 137*a*, 138; *infra*, § 248, as to effect of act of 1798.

"Treaties of foreign offensive and defensive alliance are contrary to the declared policy of this Government. In the early years of our independence certain compacts of this nature were projected. A notable instance is found in the treaty with France, concluded in 1778, during the Revolutionary war, by the 11th article of which the United States guaranteed the French possessions in this hemisphere. The fulfillment of this stipulation proved to be the occasion of much embarrassment, and eventually of serious misunderstanding between the two countries, which defeated its object and rendered further 'entangling alliances,' as Mr. Jefferson characterized them, objectionable to the people of the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. Baker, July 25, 1884. MSS. Inst., Venez. As to construction of treaty of 1778 in respect to admission of French prizes into port, see *infra*, §§ 394–396.

The treaty between the United States and France of 1778 enabled the subjects of France to purchase and hold lands in the United States.

Chirac *v.* Chirac, 2 Wheat., 259. See Carneal *v.* Banks, 10 Wheat., 181; also, 5 Lodge's Hamilton, 49.

Under the nineteenth article of the treaty (annulled by act of 1798, 1 Stat. L., 578), a French privateer has a right to make repairs in our ports, as the replacement of her force is not an augmentation.

Moodie *v.* The Phœbe Anne, 3 Dall., 319.

Marshals are not required by law to execute the sentence of a French consul pronounced under the 12th article of the treaty of 1788, relating to protests of masters, &c.

1 Op., 43, Bradford, 1794.

The refusal of a district judge to issue a warrant under the ninth article of the convention between France and the United States, of 1788, cannot be interfered with by the Supreme Court; the latter having no control over a district judge exercising legal discretion.

1 Op., 55, Bradford, 1795.

For the effect of these treaties on the claims of citizens of the United States on its own Government for spoliations which the United States assumed, see *infra*, § 248.

The seventh article of the treaty of 1778 provided that ships of war and privateers of France may freely carry the ships and goods taken from their enemies, into the ports of the United States, without being obliged to pay any fees to the officers of the admiralty, or any other judges; that such prizes are not to be arrested or seized when they enter into the ports of the United States; that the officers of the United States shall not make any examination concerning the lawfulness of the prizes; that they may depart at any time, and carry their prizes to the places expressed in their commissions; but that, on the contrary, no shelter or refuge shall be given, in the ports of the United States, to such ships as had been made prize of the subjects, people, or property of France; but if such shall come in, being forced by stress of weather or the danger of the sea, all proper means shall be vigorously used that they go out and retire thence as soon as possible.

Under the neutrality act of 1794 there were a series of arrests of French vessels in United States ports, the validity of which arrests were adjudicated by the admiralty courts in such ports. Of this intervention of the judiciary the French ministers in the United States complained, holding that French vessels in the United States were under such circumstances entitled to come and go as they pleased. But the reply was that in all cases of disputed rights, the judiciary must be appealed to; and that whether such a right as that claimed by France was given by the treaty was the question at issue, which, under a constitutional system like that of the United States, the courts must, for municipal purposes, decide.

As to the rightfulness of this position, see *supra*, § 9.

The letters of the French ministers, with the accompanying papers, and the replies by Mr. Randoph and Mr. Pickering, are given in 1 Am. St. Pap. (For. Rel.), 559 *ff.*

"On the 29th of November, 1775, Congress appointed a 'committee of secret correspondence,' whose duty it would be to correspond with the friends of the colonies in other parts of the world. On the 3d of March, 1776, this committee instructed Silas Deane to proceed to France to enter into communication with M. de Vergennes, and to ascertain, if possible, 'whether, if the colonies should be forced to form themselves into an independent state, France would * * * enter into any treaty or alliance with them for commerce or defense, or both.' These instructions were signed by Dr. Franklin, Benjamin Harrison, John Dickinson, Robert Morris, and John Jay, and the practical wis-

dom of the signers is displayed in the first instruction they contain: 'When you come to Paris * * * you will be introduced to a set of acquaintance, all friends to the Americans. By conversing with them you will have a good opportunity of acquiring Parisian French.'

"On the 17th day of the following September, nearly two years prior to the adoption of the Articles of Confederation, 'Congress took into consideration the plan of treaties to be proposed to foreign nations, with the amendments agreed to by the committee of the whole,' and thereupon adopted a plan of treaty to be proposed to His Most Christian Majesty the French King, which will be found in the secret journal.'

"This remarkable state paper contains the germ (often expressed in the identical language) of many of the provisions of subsequent treaties of the United States.

"In one respect it was many years in advance of provisions actually incorporated into any treaty. Its first and second articles stipulated that the citizens of each country in the ports of the other should pay no other duties or imports than the natives were required to pay, and should enjoy the same privileges, immunities, and exemptions in trade, navigation, and commerce which natives enjoyed, and the twelfth article contemplated a similar reciprocal agreement in respect of some exports. It was not until after the peace of 1814 that this principle of reciprocity was incorporated into a treaty of the United States.

"The commissioners who were originally selected by the Continental Congress to conclude treaties with the European powers were Dr. Franklin, Silas Deane, and Thomas Jefferson. Jefferson having declined, Arthur Lee was elected in his place.

"On the 6th of February, 1778, these commissioners concluded a treaty of alliance and a treaty of amity and commerce with the King of France. These important acts were followed by the conclusion of treaties of amity and commerce with the Netherlands, in 1782, and with Sweden in 1783; of the treaty of peace with Great Britain in 1783 (to which the names of Adams, Franklin, and Jay were attached under a special power); of a treaty of amity and commerce with Prussia in 1785; of a treaty of peace and friendship with Morocco in 1787, and of a consular convention with France in 1788.

"In regulating the commercial and political relations between the United States and other powers these several treaties secured the recognition of the independence of the United States, and also the assent of other powers to many important principles, some of which were not then universally recognized as constituting part of the public law which should govern the intercourse of nations with each other. It is not difficult to recognize in these provisions the impress of the statesmanlike intelligence and humane and elevated characters of the members of the Continental Congress, and of the American plenipotentiaries who negotiated the several treaties.

"The evils of war were lessened by agreements that, in case it should break out, time should be given to the citizens of each in the territories of the other to close their business and remove their properties; or that, should differences arise, resort should not be had to force until a friendly application should be made for an arrangement.

"A restraint was imposed upon private war by provisions forbidding the citizens of either power to accept commissions or letters of marque from enemies of the other power when at war; and the acceptance of such commissions or letters was declared to be an act of piracy, which placed the offender beyond the claim of national protection.

"The rights of neutrals to maintain and carry on their commerce and trade on the high seas during time of war were fully recognized. For this purpose articles which were to be held to be contraband of war were expressly defined and limited; and in the treaty of 1785 with Prussia, which bears the signatures of John Adams, Dr. Franklin, and Jefferson, it was even agreed that no articles should be deemed contraband, so as to induce confiscation, or condemnation, and a loss of property to individuals. It was further agreed that free ships should make free goods; and that neutral goods found in an enemy's ship should not be confiscated if they had been put on board before the declaration of war, or within such short period thereafter that an ignorance of the state of war might fairly be implied.

"Precise rules were laid down to be observed in the visit of neutral vessels on the high seas, and humane regulations were made respecting vessels on which articles contraband of war should be discovered.

"'To prevent the destruction of prisoners of war by sending them into distant and inclement countries or by crowding them into close and noxious places,' regulations were made for their treatment; and it was agreed that women and children, scholars, and cultivators, 'all others whose occupations are for the common subsistence and benefit of mankind,' should be allowed to continue their respective employments in time of war; that merchant and trading vessels employed in rendering the necessaries of human life more easy to be obtained, should be allowed to pass unmolested in such time; and that no commissions should be granted to private armed vessels.

"The power of the new nation whose existence had been recognized by these treaties to regulate and control its commercial relations with foreign powers was uniformly asserted in this series of treaties. They placed each of the other powers, in respect of commerce and navigation within each and every state, on the footing of the most favored nation; and it was agreed with Prussia that the ports of each power should be open to the other, and that the duties, charges, and fees, to be imposed by each upon articles the growth, produce, or manufacture of the other, should be only such as should be paid by the most favored nation.

"In the articles affecting the relations between the United States and the several States these early treaties asserted the nationality of the United States in a no less marked manner.

"They prohibited the exaction in any State of the droit d'aubaine or other similar duty. They allowed aliens to hold personal property and to dispose of it by testament, donation, or otherwise, and to succeed to it, and they prohibited the exaction in such case by any State of dues, except such as the inhabitants of the country were subject to. They allowed aliens, without obtaining letters of naturalization, to inherit real estate and things immovable in every State, but in such case the Prussian alien was required to sell the real estate and withdraw the proceeds, which he was to be permitted to do without molestation, and in case of withdrawal no droit de détraction was to be exacted.

"The right to aliens to frequent the coasts and countries of each and all the several States, and to reside there and to trade in all sorts of produce, manufactures, and merchandise was granted by the National Government, and the States were prohibited from imposing upon such aliens any duties or charges to which the citizens of the most favored nation were not made subject. Resident aliens were also assured against State legislation to prevent the exercise of an entire and perfect liberty of conscience and the performance of religious worship, and,

when dying, they were guaranteed the right of decent burial and undisturbed rest for their bodies.

"The consular convention concluded with France by Jefferson maintained a yet wider supremacy for the national authority. It authorized French consuls to administer in certain cases upon the estates of their deceased countrymen in the several States, to exercise police over all the vessels of their nation in whatever American port they might discharge their functions, to arrest the officers or crews of such vessels, to require the courts to aid them in the arrest of deserters, and it even elevated them into judges and authorized them to determine all differences and disputes arising between their countrymen in the United States.

"The same statesmen contemplated at one time a postal convention between France and the United States. A scheme was submitted by the French minister, after considering which Jay submitted a counter proposal, but nothing further appears to have been done. Had the scheme been carried out it would have anticipated by half a century the modern international postal convention of the United States.

"The several treaties and conventions thus negotiated have served as the basis or model of many of the commercial and general conventions entered into by the United States since the adoption of the Constitution."

Mr. J. C. B. Davis, Notes, &c.

"The construction put by President Washington on the agreement of guarantee contained in the eleventh article of the treaty of 1778 with France, together with the conclusion of the treaty of 1794 with England, had affected the relations of the two countries to such a degree that in 1798 Congress had, by law, assumed to exonerate the nation from further obligation to observe the treaties with France, and the Attorney-General had given an official opinion that there was a state of war. The treaty of 1800 restored the good relations, but in the amendments on each side the old treaties entirely disappeared. The subject will be further considered hereafter. This treaty, although concluded during the administration of President Adams, was finally proclaimed by Jefferson after he became President."

Mr. J. C. B. Davis, Notes, &c. As to effect of this guarantee, see prior authorities in this section; and see, also, *supra*, § 137*a*; *infra*, §§ 240, 248.

"Mr. Trescot remarks, in reference to our position at the commencement of the wars growing out of the French Revolution, 'There were two courses open to the United States,—either to give way to the pressure of circumstances and join one or other of the contending parties or to declare the French treaties null and void, and, without approaching England, hold themselves free and neutral. After a long and conscientious deliberation, General Washington determined upon a course which was neither one nor the other, and which, notwithstanding its fair and honest spirit, combined, it must be acknowleged, the difficulties of both. He resolved to maintain neutrality and the French treaties together.' (Diplomatic History of the Administrations of Washington and Adams, p. 138.) The exoneration of the United States from the duties imposed by the French treaties would seem to have been far from clear, even in the minds of those who had maintained the right, under the circumstances, of our being at liberty to absolve ourselves from the obligation of them. Mr. Hamilton, notwithstanding the advice he had given as a member of Wash-

ington's Cabinet in 1793, and his subsequent repugnance in 1799 to any renewal of negotiations with a revolutionary government in France, in 1797, in a letter to his successor in office, advocated an extraordinary mission, and which, according to him, 'ought to embrace a character in whom France and the opposition have full confidence.' The motive assigned was, 'We may remould our treaties. We may agree to put France on the same footing as Great Britain by our treaty with her. We may also liquidate, with a view to *future* wars, the import of the mutual guarantee in the treaty of alliance, substituting specific succors and defining the *casus fœderis*. But this last may or may not be done, though with me it is a favorite object.' (Gibb's Memoirs of the administrations of Washington and Adams, vol. i, p. 490. Mr. Hamilton to Mr. Wolcott, Apr. 5, 1797. C. F. Adams, Works of John Adams, vol. x, p. 254.)

"The embarrassments arising from the special privileges accorded to France, referred to in the text, were much increased by the insertion of similar provisions in the treaty of 1794, with England, and by the measures adopted by Congress to abrogate the French treaties, after the offensive termination, in 1798, of the mission of General Pinckney, with whom were associated Mr. (afterwards chief justice) Marshall and Mr. Gerry. In order to comprehend fully the subsequent negotiations between Ellsworth, Davie, and Murray, and Joseph Bonaparte, Fleurieu, and Roederer, which resulted in the convention of September 30, 1800, 'the following facts, Mr. Trescot says, 'must always be borne in mind: (1) That by the 11th article of the treaty of alliance France and the United States had mutually guaranteed their American possessions, and that by the 17th and 22d articles of the treaty of commerce of 1778 they granted to each other the mutual and exclusive privilege of taking their prizes and privateers into each other's ports. (2) That by the (24th and 25th articles of the) treaty of 1794 with England this same exclusive privilege had been granted by the United States to that power; but that owing to the priority of the French treaty, and the exclusive character of the privilege, it remained in abeyance, as far as England was concerned, so long as the French treaty lasted. (3) That by the act of July, 1798, the United States Government had canceled the French treaties of 1778, and thus given priority and activity to the exclusive privilege stipulated in the treaty with England. (Diplomatic History, etc., p. 208.)

"The draft of the convention presented by the American plenipotentiaries contained an article for a commission to ascertain indemnities mutually due, and it provided in reference to the commissioners that 'they shall decide the claims in question according to the original merits of the several cases, and to justice, equity, and the law of nations, and in all cases of complaint existing prior to the 7th of July 1798 (the date of the cat of Congress cancelling the treaties), according to the treaties and consular convention then existing between France and the United States.

"That France should admit the validity of the unilateral abrogation of the treaties, except as an act of war, which of itself would discharge all reclamations for their previous violation, could scarcely have been expected on the part of the United States. Much less could it have been supposed that if she stipulated to make compensations for infractions of conventional obligations, France would recognize those altered relations, professedly induced by a disregard of our reclamations, which transferred to England the special privileges that the treaties of the revolution secured to her. 'The French plenipotentia-

ries would consent to the abrogation of the old treaties; but as such an abrogation could only be the result of war, they were obliged to consider the action of the United States preceding, as equivalent to war, and a new treaty, in necessary consequence, a treaty of peace. In such case the question of indemnity must be laid aside, because a war extinguished all neutral obligations; each party had taken the remedy of complaints into its own hands, and a treaty of peace was a fresh start upon such a new basis as their respective positions warranted them in proposing; and therefore they offered to the American ministers either the abrogation of the old treaties without indemnity or indemnity with the old treaties. And they added that, in any new treaty, while France would cheerfully abandon her privilege of exclusive asylum, she would not consent to occupy an inferior position to any other nation. (*Ibid.*, p. 215.)"

Lawrence's Wheaton (ed. 1863), pp. 712–714. For a discussion of the obligations imposed on the United States by the treaty of 1778 with France, see 3 Phillimore Int. Law (3 ed.), 228; 1 Lyman's Diplomacy of the U. S., 38 *ff.*; 1 Randall's Jefferson, chap. xiv, *ff.*

"The treaties of 1778 were two in number, that of 'alliance,' the one of most immediate, and, in fact, at the time, of absolutely vital importance to the United States; and that of 'amity and commerce.' While separate instruments, they were concluded upon the same day, were the result of the same negotiation, signed by the same plenipotentiaries, and are, in diplomatic effect, one instrument. The treaty of alliance, after referring to its companion, the treaty of commerce, states that the two powers 'have thought it necessary to take into consideration the means of strengthening the engagements therein made,' and of 'rendering them useful to the safety and tranquillity of the two parties; particularly in case Great Britain, in resentment of that connection * * * should break the peace with France, either by direct hostilities or by hindering her commerce and navigation in a manner contrary to the rights of nations and the peace subsisting between the two crowns;' and two powers resolving in such case to join against the common enemy determined upon the treaty, which provided that if war should break out between France and Great Britain during the war for America independence, each party should aid the other, according to the exigencies, as good and faithful allies; that the essential end of the alliance, called a 'defensive' alliance, was the 'liberty, sovereignty, and independence, absolute and unlimited, of the United States.'

"Provision was also made for a possible conquest of Canada, Bermuda, and the islands in the Gulf of Mexico, and each party was forbidden to conclude a truce or peace with Great Britain without the consent of the other. It was further agreed that neither should lay down arms until the independence of the United States was assured by treaties terminating the war. No claim was to be made by one against the other for compensation, whatever the result, and then came the guarantee, out of which afterwards arose so serious complications, national and international, which not only drove our country, weak and exhausted from seven years' strife, to the verge of war, but also stirred up at home a bitter political contest, carried even into the intimacy of a President's Cabinet.

"These stipulations are contained in the eleventh and twelfth articles, whereby each party guaranteed 'forever against all other powers'—first, the United States to France: All the possessions of France in America as well as those it might acquire by any future treaty of peace;

second, France to the United States: 'Their liberty, sovereignty, and independence absolute and unlimited,' together with their possessions and their additions or conquests made from Great Britain during the war. Such, in substance, was the treaty of alliance; it has never been contended so far as known to us that France did not fulfill the requirements which this instrument imposed upon her during our contest with Great Britain.

"The provisions of the other agreement, the treaty of commerce, of importance in this case (alluding to them briefly) required protection of merchantmen; required ships of war or privateers of the one party to do no injury to the other; and provided especial, purely exceptional, and exclusive privileges by each party to the other as to ships of war and privateers bringing prizes into port.

"The treaty of alliance was not one-sided, for it imposed upon the United States a possible duty and burden in the fulfillment of the guarantee of French possessions in America 'forever' against all other powers. * * *

"We had promised France that their ships of war and privateers might freely carry whithersoever they pleased the ships and goods taken from their enemies; that these prizes should not be arrested or seized, or examined, or searched in our ports, but might at any time freely leave, while no shelter or refuge was to be given to vessels having made prize of her 'subjects, people, or property.' (Article 17, treaty of commerce, 1778.) The United States had thus given France, and for consideration, not only a valuable, but an exclusive right; yet the Jay treaty in the twenty-fifth article gave these same privileges to Great Britain, excluding all vessels which 'should have made prize upon [her] subjects.'

"The conflict of the treaties is evident and of course was fully appreciated at the time." As to Jay's Treaty, see *infra*, § 150 *a*.

"While the Jay treaty was concluded in November, 1794, its ratifications were not exchanged until October the following year, and meantime the British orders in council directing seizure of our vessels and provisions bound to France were so enforced as to call forth from Mr. Randolph, then Secretary of State, the warning, as late as July, 1795, that the Jay treaty had not yet been ratified by the President; 'the late British order in council for seizing provisions is a weighty obstacle to ratification. I do not suppose that such an attempt to starve France will be countenanced.' (Foreign Relations, vol. 1, p 719.) Every endeavor was made by the United States to secure a repeal of the admiralty order, but without success, and finally our minister in London, Mr. Adams, was instructed that if, after every prudent effort, he found it could not be removed, its continuance was not to be an obstacle to the exchange of ratifications. The order was not removed or modified; nevertheless ratifications of the treaty were exchanged the following October. * * *

"Long prior to this, Jefferson, while in Paris, had told the British minister there, during a discussion as to the effect of the treaties of 1778, in case of war between France and Great Britain, and told him 'frankly and without hesitation,' that the dispositions of the United States would then be neutral, and that this would be to the interest of both powers, because it would relieve both from all anxiety as to feeding their West India Islands; that England, too, by suffering us to remain so, would avoid a heavy land war on our continent, which

might very much cripple her proceedings elsewhere; that our treaty [with France] indeed, obliged us to receive into our ports the armed vessels of France, with their prizes, and to refuse admission to the prizes made on her by her enemies; that there was a clause, also, by which we guaranteed to France her American possessions, and which might perhaps force us into the war if these were attacked. 'Then it will be war,' said the minister, 'for they will assuredly be attacked.'

"In 1780 another American minister informed the English secretary of state for foreign affairs 'that in a war between Great Britain and the House of Bourbon (a thing which must happen at some time) we [the United States] can give the West India Islands to whom we please. without engaging in the war ourselves, and our conduct must be governed by our interest' (Wait's Am. St. Pap, vol. 10, 97); and this in face of a treaty concluded but twelve years before, wherein we pledged ourselves to a guarantee 'forever' of the possessions in America of that very House of Bourbon. Early in 1794 Mr. Jefferson, then Secretary of State, said, as to this subject, that he had no doubt we should interpose at the proper time 'and declare both to England and France that these islands are to rest with France, and that we will make a common cause with the latter for that object.' (Jefferson to Madison, April 3, 1794, Jeff. Works, vol. 4, 103.)"

Opinion of Judge John Davis on French spoliations. C. Cls, May 17, 1886 See *infra*, § 248.

As to annulling treaties by legislation, see *supra*, § 138; App., vol. iii, § 370.

(*b*) CONVENTION OF 1800.

§ 148*a*.

As is elsewhere noticed (*supra*, §§ 78, 81, 83), Mr. Adams, in February, 1799, after the rupture with France consequent on the termination of the mission of Messrs. Pinckney, Marshall and Gerry in March, 1798, (*supra*, § 85,) nominated as ministers extraordinary to France Chief-Justice Ellsworth, Governor Davie, of North Carolina, and Mr. Murray, then minister at The Hague. These envoys found Napoleon in full power as First Consul. The relations of the countries were greatly changed from what they had been on the preceding mission. The prior treaty of alliance had, by act of Congress, been dissolved, so far as concerned the United States municipally; and the ministers, instead of coming to Paris on a treaty basis, appeared before the French Government simply as claiming, on the basis of the law of nations, indemnity for injuries sustained from France, which indemnity, however, could scarcely be insisted on without tendering something in the nature of an equivalent. The treaty of alliance, as has just been seen, secured to France several important advantages: (1) A guarantee by the United States of the French-American islands, which guarantee, however, it was claimed that the Directory had waived by its ministers in the United States (2) The mutual and exclusive privilege of taking prizes and privateers into each other's ports. This privilege was afterwards granted to England by the treaty of 1794, but, so far as concerns England, it was claimed to remain in abeyance, as long as the French treaty was in force. But by the act of July, 1798, it was alleged, the exclusive privileges given in the British treaty of 1794, came into effect, as a consequence of the abrogating by that act of the French treaty of 1778. The American envoys were instructed as follows:

"The following points are to be considered ultimated:

"1. That an article be inserted for establishing a board, with suitable powers, to hear and determine the claims of our citizens for the causes hereinbefore expressed, and binding France to pay or secure payment of the sums which shall be awarded.

"2. That the treaties and consular convention, declared to be no longer obligatory by act of Congress, be not, in whole or in part, revived by the new treaty; but that all engagements to which the United States are to become parties be specified in the new treaty.

"3. That no guarantee of the whole or any part of the dominions of France be stipulated, nor any engagement made in the nature of an alliance.

"4. That no aid or loan be promised in any form whatever.

"5. That no engagement be made inconsistent with the obligations of any prior treaty, and, as it may respect our treaty with Great Britain, the instruction herein marked XXI is to be particularly observed.

"6. That no stipulation be made granting powers to consuls or others under color of which tribunals can be established within our jurisdiction, or personal privileges be claimed by Frenchmen, incompatible with the complete sovereignty of the United States in matters of policy, commerce, and government.

"7. That the duration of the proposed treaty be limited to twelve years, at furthest, from the day of the exchange of the ratifications, with the exceptions respecting its permanence in certain cases specified under the instructions marked XXX" (in reference to the settlement of claims).

The positions taken by the American envoys, on the question of the abrogation of the treaty of alliance, were as follows:

1. That a treaty being a mutual compact, its violation by one party justified its abrogation by the other; and 2, "That it had become impossible for the United States to save their commerce from the depredations of the French cruisers, but by resorting to defensive measures; and that, as by their constitution existing treaties were the supreme law of the land, and the judicial department, who must be governed by them, is not under the control of the executive or legislative, it was also impossible for them to legalize defensive measures, incompatible with the French treaties, while they continued to exist. Then it was they were formally renounced, and from that renunciation, there resulted, necessarily, a priority in favor of the British treaty, as to the exclusive asylum for privateers and prizes."

To these arguments the French Government replied with great force, "that, when, on the one hand, Congress declare that France has contravened these treaties, and that the United States are released from their stipulations; and when France declares that she has conformed to these treaties, that she desires their execution, and that the United States alone have infringed them, where is the tribunal or law to enforce the exoneration in preference to the execution?

"So long as a difference exists between the two contracting parties, respecting the existence or abrogation of a treaty, no right or benefit can result to a third party from the abrogation contended for by one.

"If France had declared the treaties annulled, and the United States had maintained their validity, England would have no ground for saying to America, 'we succeed to the rights of France.' * * * If one of two contracting parties is at liberty, whenever he may please, to cancel his obligations in virtue of his own judgment concerning facts or men or things, no binding force can be attached to treaties, and the

term itself should be erased from every language. If the right of anteriority can be destroyed to the prejudice of the nation that possesses it, by the sole act of one of the parties by whom that right has been recognized, it must be acknowledged as a principle, that the nation making the second treaty converts the one with whom she first contracted into an enemy, and that she may be certain of being despoiled by that enemy whenever the time may be propitious for an open explanation."

The negotiations preceding the convention of 1800 are given in 1 Lyman's Diplomacy of U. S., chap. viii.

As to annulling by statute, see *supra*, § 138.

As is argued by Mr. Trescot, in his volume on American Diplomatic History (Boston, 1857), the first of these positions cannot be sustained, except as to stipulations which are reciprocally dependent. The second position, also, is inconsistent with the established rule that the Executive of a Government cannot set up its own domestic arrangements to support a diplomatic claim. The French ministers in reply said they would consent to the abrogation of the treaty of alliance and the consequent commercial treaty if such abrogation was claimed as a result of war; but in such case the claims for indemnity could no longer be maintained, since war extinguishes claims as well as treaties. The American envoys, departing in this respect from their instructions, then agreed to surrender their claims for indemnity as an equivalent for the French surrender of the privileges given in the prior treaties. The French ministers, however, refused to assent to such a surrender as long as the United States gave to Great Britain exclusive privileges in the ports of the United States. In order to avoid this new difficulty, they proposed a temporary convention, to consist of stipulations which are thus condensed by Mr. Trescot:

"1. That the parties, not being able at present to agree respecting the former treaties and indemnity, these subjects should be postponed for future negotiation, and, in the mean time, that the said treaties should have no operation.

"2. The parties shall abstain from all unfriendly acts, their commerce shall be free, and debts shall be recoverable in the same manner as if no misunderstanding had intervened.

"3. Property captured and not yet definitely condemned, or which may be captured before the exchange of ratifications, shall be mutually restored. Proofs of ownership to be specified in the convention.

"4. Some provisional regulations to be made to prevent abuses and disputes in future cases of capture."

These stipulations being accepted as the basis of a convention, a technical difficulty was interposed by the French negotiators in a note of September 29, 1800, in which they said:

"The ministers of France insist, in relation to the treaty, upon one of three things:

"Either that the treaty shall be signed in the French language only, without any reservation, the mode pursued by the consular convention of 1788 between France and the United States, and by the treaty of 1786 between France and England;

"Or, that it shall be signed in the French language only, and that a separate article (similar to the one at the close of the treaty of 1783 between France and England) shall stipulate that the French language

used in the treaty shall not constitute a precedent, nor operate to the prejudice of either of the contracting parties;

"Or, finally, that it shall be signed in the French and English languages, accompanied by the following declaration, conforming to the one at the end of the treaty of alliance and the treaty of commerce of 1788: 'In faith whereof the respective plenipotentiaries have signed the above articles, both in the French and English languages; declaring, nevertheless, that the present treaty was originally written and concluded in the French language.'"

On September 30, 1800, the convention was signed, as noticed above, by the negotiators of both contracting parties. The material articles are articles are as follows:

"ART. II. The ministers plenipotentiary of the two parties, not being able to agree at present respecting the treaty of alliance of 6th February, 1778, the treaty of amity and commerce of the same date, and the convention of 14th of November, 1788, nor upon the indemnities mutually due or claimed, the parties will negotiate further on these subjects at a convenient time, and until they have agreed upon these points, the said treaties and convention shall have no operation, and the relations of the two countries shall be regulated as follows: * * *

"ART. IV.—Property captured and not yet definitely condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted), shall be mutually restored on the following proofs of ownership, viz: The proof on both sides with respect to merchant ships, whether armed or unarmed, shall be a passport in the form following. [Here follows a form of passport indentical with that given in the treaty of 1778.] * * * This article shall take effect from the signature of the present convention; and if from the date of said signature any property shall be condemned contrary to the intent of the said convention before the knowledge of this stipulation shall be obtained, the property so condemned shall without delay be restored or paid for.

"ART. V. The debts contracted by one of the two nations with individuals of the other, or by the individuals of the one with the individuals of the other, shall be paid, or the payment may be prosecuted in the same manner as if there had been no misunderstanding between the two states. But this clause shall not extend to indemnities claimed on account of captures or confiscations."

Other clauses for the avoidance of future difficulties were introduced.

The Senate of the United States, when the treaty was before them, declined to ratify the second article, inserting in its place the following: "It is agreed that the present convention shall be in force for the term of eight years from the time of the exchange of ratifications." The treaty was returned with this amendment to the First Consul, who, on July 30, 1801, ratified it with the following conditions:

"The Government of the United States * * * having omitted the second article, the Government of the French Republic consents to accept, ratify, and confirm the above convention * * * with the retrenchment of the second article: provided that by this retrenchment the two States renounce the respective pretensions which are the object of that article." The Senate of the United States, to whom the convention was returned, then resolved "that they considered the said convention as duly ratified, and returned the same to the President for the

usual promulgation." President Jefferson, on December 21, 1801, proclaimed the treaty in the usual form as "duly ratified," and enjoined all persons to observe and fulfill the same.

Mr. Madison, on December 18, 1801, before the convention had been thus recommitted to the Senate, instructed Mr. Livingston, minister at Paris, "that the President does not regard the declaratory clause as more than a legitimate inference from the rejection of the Senate of the second article." It is on the action thus stated that the claims against the United States for French spoliations are based. (See *infra*, §§ 227, 228, 248.)

By the treaty of 1800 the United States Government agreed to renounce its claims against France for prior spoliations, in consideration of the renunciation by France, among other things, of its claims against the United States for its alleged breach of its guarantee (in its treaty of February 6, 1778) of the French possessions in America.

Mr. Clay, Sec. of State, to President J. Q. Adams, May 20, 1826. MSS. Report Book.

The French-American treaty of 1800, as signed in Paris on September 13, 1800, with the correspondence relative thereto, is given in 2 Am. St. Pap. (For. Rel.), 295. See, as to effect of the renunciation in the ratifying clause, *infra*, § 248; *supra*, 137*a*.

By the fourth article of the treaty with France, of 1800, it was provided that "property captured but 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.

U. S. *v.* Schooner Peggy, 1 Cranch, 103.

The convention of 1800 between the United States and France, enabling the people of one country holding lands in the other to dispose of the same by testament or otherwise, and to inherit lands in the respective countries without being obliged to obtain letters of naturalization, rendered useless the performance of the condition required by the law of Maryland to sell to a citizen within ten years, and the conventional rule applied equally to the case of those who took by descent, under the act, as to those who acquired by purchase without its aid.

Chirac *v.* Chirac, 2 Wheat., 259.

The stipulation in the convention of 1800, "that in case the laws of either of the two States should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be," was held not to affect the rights of a French subject, who takes or holds by the convention, so as to deprive him of the power of selling to citizens of this country; and was held to give a French subject who had acquired lands by descent or devise (and perhaps in any other manner), the right during life to sell or otherwise

dispose thereof, if lying in a State where lands purchased by an alien would immediately be escheatable. Although the convention of 1800 has expired by its own limitation, yet the instant the descent was cast on a French subject during its continuance his rights became complete under it, and could not be affected by its subsequent expiration.

Ibid.

By the fourth article of the treaty of 1800 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." It was further provided that this provision should take effect from the signature of the convention, and that, "if, from the date of the said signature, any property shall be condemned contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained, the property so condemned shall, without delay, be restored or paid for." It was held that the case of a Portuguese brig, captured by a French schooner in July, 1800, and afterwards recaptured by an American vessel and taken to St. Kitts, where she was adjudged to be restored to her former owners, on payment of salvage, did not come within this article; and that the demand of the French minister for the vessel, or the salvage, from the United States, was not well founded. The word *captured*, as a technical and descriptive term, does not include the meaning of the term *recaptured*, and should not be given such effect in the above article.

1 Op., 111, Lincoln, 1802.

The proceeds of a French vessel captured and condemned prior to the 30th of September, 1800, were, subsequently to that date, but in pursuance of the decree of condemnation of the circuit court, paid over in moieties to the captors and the Government respectively. The decree of condemnation was afterwards reversed by the Supreme Court, and the moiety distributed under it to the United States was paid over to the owners of the vessel. It was advised that the United States were not liable, under the fourth article above quoted, for the moiety which had been paid to the captors.

1 Op., 114, Lincoln, 1802.

"This opinion was principally based upon the ground that the judgment of the circuit court was a definitive condemnation, within the meaning of the treaty. It had, in fact, already been decided by the supreme court that the condemnation was not so final, and that the case came within the fourth article. This decision had not been seen by the Attorney-General, when the above opinion was given, and upon his attention being called to it, he modified his opinion to the extent of advising that the decision of the Supreme Court be followed 'as binding in this particular instance'; and added that, 'although they (the court)

have fixed the principle for themselves, and thereby bound others, in reference to the case on which they have adjudicated, it can, I conceive, extend no further. In all other cases in which the Executive or the courts are obliged to act, they must decide for themselves, paying a great deference to the opinions of a court so high an authority as the Supreme Court of the United States, but still greater deference to their own convictions of the meaning of the laws and Constitution of the United States, and their oaths to support them."

1 Op., 119, Lincoln, 1802.

The following summary of the negotiations with France down to 1803 is condensed from Mr. J. C. Bancroft Davis's Notes to the Treaties of the United States:

"On the 25th of January, 1782, the Continental Congress passed an act authorizing and directing Dr. Franklin to conclude a consular convention with France on the basis of a scheme which was submitted to that body. Dr. Franklin concluded a very different convention, which Jay, the Secretary for Foreign Affairs, and Congress did not approve." Franklin having returned to America, the negotiations then fell upon Jefferson, who concluded the convention of 1788. This was laid before the Senate by President Washington on the 11th of June, 1789.

"On the 21st of July it was ordered that the Secretary of Foreign Affairs attend the Senate to-morrow and bring with him such papers as are requiste to give full information relative to the consular convention between France and the United States. Jay was the Secretary thus 'ordered.' He was holding over, as the new department was not then created. The bill to establish a Department of Foreign Affairs had received the assent of both houses the previous day, but had not yet been approved by the President. Jay appeared, as directed, and made the necessary explanations. The Senate then resolved that the Secretary of Foreign Affairs under the former Congress be requested to peruse the said convention, and to give his opinion how far he conceives the faith of the United States to be engaged, either by former agreed stipulations or negotiations entered into by our minister at the Court of Versailles, to ratify in its present sense or form the convention now referred to the Senate. Jay made a written report on the 27th of July that, in his judgment, the United States ought to ratify the convention; and the Senate gave its unanimous consent. The statute to carry the convention into effect was passed the 14th of April, 1792.

"Three articles in the treaties with France, concluded before the Constitution, became the cause of difference between the two powers:

"1. Article XI of the treaty of alliance, by which the United States, for a reciprocal consideration, agreed to guarantee to the King of France his possessions in America, as well present as those which might be acquired by the treaty of peace.

"2. Article XVII of the treaty of amity and commerce, providing that each party might take into the ports of the other its prizes in time of war, and that they should be permitted to depart without molestation; and that neither should give shelter or refuge to vessels which had made prizes of the other unless forced in by stress of weather, in which case they should be required to depart as soon as possible.

"3. Article XXII of the same treaty, that foreign privateers, the enemies of one party, should not be allowed in the ports of the other to fit

their ships or to exchange or sell their captures, or to purchase provisions except in sufficient quantities to take them to the next port of their own state.

"Jefferson, who was the minister of the United States at the Court of Versailles when the Constitution went into operation, was appointed Secretary of State by President Washington on the 26th of September, 1789. He accepted the appointment and presented Short to Neckar as chargé d'affaires of the United States.

"Gouverneur Morris, of New York, who had been in Europe from the dawn of the French revolution, and had been in regular friendly correspondence with Washington, was appointed minister to France on the 12th of January, 1792. (See *supra*, §§ 107 *ff.*)

"Morris * * * did not succeed in gaining the good-will of a succession of Governments, with which he had little sympathy; for he writes Jefferson, on the 13th of February, 1793: 'Some of the leaders here who are in the diplomatic committee hate me cordially, though it would puzzle them to say why.' See *supra*, §§ 84, 85, 107 *ff.*; *infra*, § 150.

"When Morris was appointed minister, the commercial relations between the two countries were satisfactory to neither. Exceptional favors to the commerce of the United States, granted by royal decree in 1787 and 1788, had been withdrawn and a jealousy was expressed in France in consequence of the act of Congress putting British and French commerce on the same basis in American ports. No exceptional advantages had come to France from the war of the Revolution, and American commerce had reverted to its old British channels.

"Jefferson greatly desired to conclude a convention with France which should restore the favors which American commerce had lost, and bring the two countries into closer connection. On the 10th of March, 1792, he instructs Morris: 'We had expected ere this, that in consequence of the recommendation of their predecessors, some overtures would have been made to us on the subject of a treaty of commerce. * * * Perhaps they expect that we should declare our readiness to meet on the ground of treaty. If they do we have no hesitation to declare it.' Again, on the 28th of April, he writes: 'It will be impossible to defer longer than the next session of Congress some counter-regulations for the protection of our navigation and commerce. I must entreat you, therefore, to avail yourself of every occasion of friendly remonstrance on this subject. If they wish an equal and cordial treaty with us, we are ready to enter into it. We would wish that this could be the scene of negotiation.' Again, on the 16th of June, he writes: 'That treaty may be long on the anvil; in the mean time we cannot consent to the late innovations without taking measures to do justice to our own navigation.'

"The great revolution of the 10th of August, and the imprisonment of the King, were duly reported by Morris; and Jefferson replied on the 7th of November: 'It accords with our principles to acknowledge any Government to be rightful which is formed by the will of the nation substantially declared * * * There are some matters which I conceive might be transacted with a Government *de facto;* such, for instance, as the reforming the unfriendly restrictions on our commerce and navigation.'

"To these instructions Morris answered on the 13th of February, 1793, three weeks after the execution of the King, and a fortnight after the declaration of war against England: 'You had * * * instructed me to endeavor to transfer the negotiation for a new treaty to Amer-

ica, and if the revolution of the 10th of August had not taken place. * * * I should, perhaps, have obtained what you wished. * * * The thing you wished for is done, and you can treat in America if you please.' In the same dispatch Morris spoke of the 'sending out of M. Genet, without mentioning to me a syllable either of his mission or his erraud,' and said that 'the pompousness of this embassy could not but excite the attention of England.'

"On the 7th of March Morris wrote to Jefferson that 'Genet took out with him three hundred blank commissions, which he is to distribute to such as will fit out cruisers in our ports to prey on the British commerce,' and that he had already mentioned the fact to Pinckney, and had desired him to transmit it.

"The new condition of affairs caused by the war induced the President to submit a series of questions to the members of his cabinet for their consideration and reply. It would seem from a passage in Mr. Jefferson's Ana that the second of these questions—'shall a minister from France be received?'—was suggested by the Secretary of State. An account of the meeting of the Cabinet at which these questions were discussed will be found in 9 Jeff. Works, 142. (See *supra*, § 137.)

"The first two questions were unanimously answered in the affirmative—that a proclamation for the purpose of preventing citizens of the United States from interfering in the war between France and Great Britain should issue, and that Genet should be received; but by a compromise, the term 'neutrality' was omitted from the text of the proclamation." (See, as to this proclamation, *infra*, §§ 402, 402*a*.)

"The policy which Washington favored denied France nothing that she could justly demand under the treaty, except the possible enforcement of the provision of guarantee; and that provision was waived by Genet in his first interview with Jefferson. 'We know,' he said, 'that under present circumstances we have a right to call upon you for the guarantee of our islands. But we do not desire it.' * * * (*Infra*, §§ 248, 402; *supra*, § 84.)

"It is not likely that the purposes of Genet's mission were fully comprehended by the American Government. By a treaty in 1762 (first made public in 1836), France ceded Louisiana to Spain. Genet was instructed to sound the disposition of the inhabitants of Louisiana towards the French Republic, and to omit no opportunity to profit by it should circumstances seem favorable. He was also to direct particular attention to the designs of the Americans upon the Mississippi. * * *

"He continued to claim and exercise the right of using the ports of the United States as a base for warlike operations, and, as the discussions went on, his expressions became stronger, and more contemptuous toward the President and the Government of the United States. (*Supra*, § 84; *infra*, § 400.)

"His instructions contemplated a political alliance between the two Republics. This was never proposed. He did propose, however, the rearrangement of the debt due to France on the basis of the payment of a larger installment than was required by the contract, to be expended in the purchase of provisions in the United States; and the conclusion of a new commercial treaty. Jefferson declined the former, and as to the latter said that the participation in matters of treaty given by the Constitution to the Senate would delay any definite answer. * * *

"In retaliation, the executive provisory council of the French Republic demanded the recall of Morris. In communicating the fact to him, Secretary Randolph said, 'You have been assailed, however, from

another quarter. Nothing has ever been said to any officer of our Government by the ministers of France which required attention until the 9th day of April last, when Mr. Fawchet communicated to me a part of his instructions, indirectly but plainly making a wish for your recall. In a few days afterwards a letter was received from the executive provisory council expressive of the same wish. Mr. Fawchet was answered by me, under the direction of the President, as I am sure your good sense will think inevitable, that the act of reciprocity demanded should be performed.' (See *supra*, § 84.)

"Washington wrote Morris, when his successor went out, 'I have so far departed from my determination as to be seated in order to assure you that my confidence in and friendship and regard for you remain undiminished, * * * and it will be nothing new to assure you that I am always and very sincerely, yours, affectionately;' and when his correspondence was called for by the Senate, Washington himself, in association with Hamilton and Randolph, went over it (and it was voluminous) in order that nothing might be communicated which would put in peril those who had given him information, or which would react upon him in France. (See *supra*, §§ 84, 107.)

"Monroe succeeded Morris, and on the 12th of February, 1795, wrote: 'Upon my arrival here I found our affairs * * * in the worst possible situation. The treaty between the two Republics was violated. Our commerce was harassed in every quarter and in every article, even that of tobacco not excepted. * * * Our former minister was not only without the confidence of the Government, but an object of particular jealousy and distrust. In addition to which it was suspected that we were about to abandon them for a connection with England, and for which purpose *principally* it was believed that Mr. Jay had been sent there.' (See *supra*, § 85.)

"Monroe's and Jay's services commenced nearly simultaneously. Monroe's commission was dated the 28th of May, and Jay's the 19th of April, 1794. Jay's treaty was proclaimed the 29th of February, 1796. Monroe was not recalled until the 22d of the following August, but the angry correspondence which preceded his recall may be said to have been caused by a radical difference of opinion respecting his colleague's mission to London. * * *

"The course of the French was giving rise to many claims: For spoliations and maltreatment of vessels at sea, for losses by the embargo at Bordeaux, for the non-payment of drafts drawn by the colonial administrations, for the seizure of cargoes of vessels, for non-performance of contracts by Government agents, for condemnation of vessels and their cargoes, in violation of the provisions of the treaties of 1778, and for captures under the decree of May 9, 1793. Skipwith, the consul-general of the United States in France, was directed to examine into and report upon these claims. His report was made on the 20th November, 1795.

"On the 9th of September, 1796, Charles Cotesworth Pinckney was sent out to replace Monroe, with a letter from the Secretary of State, saying, 'The claims of the American merchants on the French Republic are of great extent, and they are waiting the issue of them, through the public agents, with much impatience. Mr. Pinckney is particularly charged to look into this business, in which the serious interests, and, in some cases, nearly the whole fortunes of our citizens are involved.' But the directory, early in October, 1793, recalled their minister from the United States. Before Pinckney could arrive in France, they, 'in

order to strike a mortal blow, at the same moment, to British industry and the profitable trade of Americans in France, promulgated the famous law of the 10th Brumaire, year 5 (31st October, 1786), whereby the importation of manufactured articles, whether of English make or of English commerce, was prohibited both by land and sea throughout the French Republic;' and, on his arrival, they informed Monroe 'that the directory would no longer recognize or receive a minister plenipotentiary from the United States until after a reparation of the grievances demanded of the American Government, and which the French Republic has a right to expect.'

"Pinckney was thereupon ordered to quit France under circumstances of great indignity, and Monroe took his formal leave on the 30th December, 1796. (See *supra*, § 85.)

"The executive directory, on the 2d of March, 1797, decreed that all neutral ships with enemy's property on board might be captured; that enemy's property in neutral bottoms might be confiscated; that the treaty of 1778 with the United States should be modified by the operation of the favored-nation clause, so as to conform to Jay's treaty, in the following respects: (1) That property in American bottoms not proved to be neutral should be confiscated; (2) That the list of contraband of war should be made to conform to Jay's treaty; (3) that Americans taking a commission against France should be treated as pirates, and that every American ship should be good prize which should not have on board a crew-list in the form prescribed by the model annexed to the treaty of 1778, the observance of which was required by the 25th and 27th articles. The 25th article made provision for a passport and for a certificate of cargo. The 27th article took notice only of the passport, and the model of the passport only was annexed to the treaty. The treaty required that the passport should express the name, property, and bulk of the ship, and the name and place of habitation of the master, but it made no provision respecting the crew-list. After the adoption of the Constitution, Congress, by general laws, made provision for national official documents for proof of, among other things, the facts referred to in the 25th and 27th articles of the treaty with France. The name of the ship was to be painted on her stern, and to be shown in the register; her ownership was to be proven on oath, and be stated in the register, and her tonnage was to be stated in the same instrument, as the result of our official survey. Equally cogent laws were made to insure an accurate crew-list. It is probable, therefore, that when the decree of March 2, 1797, was made, there was not an American ship afloat with the required documents; and it is equally probable that the French Government, which, with the whole civilized world, had acquiesced in the sufficiency of the new national system, knew that to be the fact. The decree was, therefore, equivalent in its operation to a declaration of maritime war against American commerce. The United States had at that time no navy against which such a war could be carried on. * * *

"President Adams, in his speech at the opening of the first session of the Fifth Congress (May 16, 1797), said: 'With this conduct of the French Government it will be proper to take into view the public audience given to the late minister of the United States on his taking leave of the executive directory. The speech of the President discloses sentiments more alarming than the refusal of a minister, because more dangerous to our independence and union, and at the same time studiously marked with indignities towards the Government of the

United States. It evinces a disposition to separate the people of the United States from the Government; to persuade them that they have different affections, principles, and interests from those of their fellow-citizens whom they themselves have chosen to manage their common concerns, and thus to produce divisions fatal to our peace. Such attempts ought to be repelled with a decision which shall convince France and the world that we are not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority, fitted to be the miserable instruments of foreign influence, and regardless of national honor, character, and interest. * * *

"'The diplomatic intercourse between the United States and France being at present suspended, the Government has no means of obtaining official information from that country; nevertheless there is reason to believe that the executive directory passed a decree on the 2d of March last, contravening, in part, the treaty of amity and commerce of 1778, injurious to our lawful commerce, and endangering the lives of our citizens. A copy of this treaty will be laid before you.

"'While we are endeavoring to adjust all of our differences with France, by amicable negotiations, the progress of the war in Europe, the depredations on our commerce, the personal injuries to our citizens, and general complexion of affairs, render it my indispensable duty to recommend to your consideration effectual measures of defense.

"'It is impossible to conceal from ourselves, or the world, what has been before observed, that endeavors have been employed to foster and establish a division between the Government and the people of the United States. To investigate the causes which have encouraged this attempt is not necessary. But to repel, by decided and united counsels, insinuations so derogatory to the honor, and aggressions so dangerous to the Constitution, Union, and even independence of the nation, is an indispensable duty.

"The answer of the House to this speech was in a conciliatory spirit; and on the first of the following June Congress yielded so far as to pass a law providing for passports for ships and vessels of the United States.

"Congress adjourned on the 10th of July. On the 13th President Adams commissioned Charles Cotesworth Pinckney, John Marshall, and Elbridge Gerry as envoys to proceed to France and endeavor to renew the relations which had been so rudely broken by the directory. Their instructions will be found in the 2d volume of the folio Foreign Relations, pages 153 *ff*. Among other matters they were to secure an adjustment of the claims for spoliations of citizens of the United States, by this time amounting to many millions of dollars.

"They arrived in Paris on the evening of the 4th of October, 1797, and at once notified the foreign minister of their presence and requested an interview. Instead of receiving them, three gentlemen, who have become known in history as X, Y, and Z, waited upon them at various times, sometimes singly and sometimes together, and claimed to speak for Talleyrand and the directory. They told the envoys that they must pay money, 'a great deal of money;' and when they were asked how much, they replied 'fifty thousand pounds sterling' as a *douceur* to the directory, and a loan to France of thirty-two millions of Dutch florins. They said that the passages in the President's speech which are quoted above had offended the directory, and must be retracted, and they urged upon the commissioners in repeated interviews the necessity of opening the negotiations by proposals to that effect.

"The American commissioners listened to their statements, and after consultation determined that they 'should hold no more indirect inter-

course with the Government. They addressed a letter to Talleyrand on the 11th of November, informing him that they were ready to negotiate. They got no answer; but on the 14th of December X appeared again, on the 17th Y appeared, and on the 20th 'a lady, who is well acquainted with M. Talleyrand,' talked to Pinckney on the subject; still they got no answer from Talleyrand, and on the 18th of January they read the announcement of a decree that every vessel found at sea loaded with merchandise, the production of England, should be good prize. Though unrecognized, they addressed an elaborate letter on the 27th of January, 1798, to Talleyrand, setting forth in detail and with great ability the grievances of the United States. On the 2d of March they had an interview with him. He repeated that the directory had taken offense at Mr. Adams's speech, and added that they had been wounded by the last speech of President Washington. He complained that the envoys had not been to see him personally; and he urged that they should propose a loan to France. Pinckney said that the propositions seemed to be those made by X and Y. The envoys then said that they had no power to agree to make such a loan. On the 18th of March Talleyrand transmitted his reply to their note. He dwelt upon Jay's treaty as the principal grievance of France. He says 'he will content himself with observing, summarily, that in this treaty everything having been calculated to turn the neutrality of the United States to the disadvantage of the French Republic, and to the advantage of England; that the Federal Government having in this act made to Great Britain concessions the most unheard of, the most incompatible with the interests of the United States, the most derogatory to the alliance which subsisted between the said States and the French Republic, the latter was perfectly free, in order to avoid the inconveniences of the treaty of London, to avail itself of the preservative means with which the law of nature, the laws of nations, and prior treaties furnish it.' He closed by stating 'that notwithstanding the kind of prejudice which has been entertained with respect to them, the executive directory is disposed to treat with that one of the three whose opinions, presumed to be more impartial, promise, in the course of the explanations, more of that reciprocal confidence which is indispensable.'

"Gerry was the member referred to. The three envoys answered that no one of the three was authorized to take the negotiation upon himself. Pinckney and Marshall then left Paris. Gerry remained. Talleyrand tried to induce him to enter into negotiations for a loan to France, but he refused. Before he left Paris a mail arrived from America bringing printed copies of the dispatches of the envoys, with accounts of their interviews with X, Y, and Z, and 'the lady.' Talleyrand at once asked Gerry for the four names. Gerry gave him the name of Y, Mr. Bellamy, and Z, Mr. Hautval, and said that he could not give the lady's name, and would not give X's name. The name of X is preserved in the Department of State. Gerry left Paris on the 26th July, 1798.

"The President transmitted to Congress the reports of the envoys as fast as they were received; and when he heard of Marshall's arrival in America he said to Congress, 'I will never send another minister to France without assurances that he will be received, respected, and honored as the representative of a great, free, powerful, and independent nation.' The statutes of the United States show the impression which the news made upon Congress. The 'act to provide an additional armament for the further protection of the trade of the United States, and for other purposes,' is the first of a series of acts. It was passed in the

House amid great excitement. Edward Livingston, who closed the debate on the part of the opposition, said, 'Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case.' This was followed in the course of a few weeks by acts organizing a Navy Department; for increasing or regulating the Army; for purchasing arms; for construction of vessels; for authorizing the capture of French vessels; for suspending all intercourse with France; for authorizing merchant-vessels to protect themselves; for abrogating the treaties with France; for establishing a marine corps, and for authorizing the borrowing of money. In the next session of Congress further augmentation of the Navy and of the Army was made; the suspension of intercourse was prolonged, and provisions were made for restoring captured French citizens, and for retaliations in case of death from impressments." (See *infra*, §§ 248, 335.)

"It was on the 21st of June that President Adams informed Congress of the terms on which alone he would be willing to send a new minister to France. Talleyrand immediately opened indirect means of communication with the American Cabinet through Murray, the American minister at The Hague, and on the 28th of September he sent word through Pichon, the French secretary of legation at the same place, that 'whatever plenipotentiary the Government of the United States might send to France in order to terminate the existing differences between the two countries, he would be undoubtedly received with the respect due to the representative of a free, independent, and powerful nation.' To this proffer, embodying the language of the President's message to Congress, the President replied by empowering Chief Justice Ellsworth, Mr. Davie, and Mr. Murray 'to discuss and settle, by a treaty, all controversies between the United States and France.' (See this action discussed, *supra*, § 83.)

"When these envoys arrived in France they found that the directory had been overthrown, and they had to deal with Bonaparte as First Consul. They succeeded in restoring good relations. An account of their negotiations will be found in the 2d volume of the folio edition of the Foreign Relations, pages 307 to 345. Their instructions required them to secure, (1) A claims commission; (2) abrogation of the old treaties; (3) abolition of the guarantee of 1778; (4) no agreement for a loan; (5) no engagements inconsistent with prior treaties, meaning, doubtless, Jay's treaty; (6) no renewal of the peculiar jurisdiction conferred on consuls by the convention of 1788; (7) duration of a treaty not to exceed twelve years.

"The negotiators exchanged their powers on the 7th of April, 1800, and concluded a treaty on the 30th of the following September, which (1) declared that the parties could not agree upon the indemnities; (2) nor as to the old treaties; (3) and consequently was silent respecting the guarantee; but (4) made no provisions for a loan; (5) made no engagements inconsistent with prior treaties; (6) did not renew the objectionable consular provisions, and (7) no limitation was set to its operation.

"When it was submitted to the Senate that body advised its ratification, provided the second article concerning indemnities should be expunged, and that the convention should be in force for eight years from the date of the exchange of the ratifications. The French Government assented to the limitation of the duration of the treaty, and to the expunging of the 2d article, upon condition that it should be understood that thereby each party renounced the pretensions which were the objects of the article; which was assented to by the Senate. * * *

"Between the conclusion of the two treaties of 1800 and 1803 a correspondence arose respecting the construction of the former treaty. Robert Livingston, the minister of the United States, complained that the council of prizes (which we regarded 'as a political board') was proceeding in violation of the provisions of the treaty. On the 26th of January, 1802, he was 'almost hopeless' as to the claims. His anxiety communicated itself to Madison. The French court next proposed to meet the French obligations in paper money, while the appropriations on the American side were payable in coin. Livingston thought Bonaparte stood in the way, and that, should anything happen to him, France would 'very soon be able to look all demands in the face.' Monroe was sent out to aid in the negotiations, with special powers as to New Orleans and the Floridas. He arrived just in time to find the First Consul bent on parting with Louisiana and settling with the United States. On the 9th of March, 1803, Talleyrand was already giving signs of yielding. He expressed surprise at the amount of the American claims advanced by Livingston (20,000,000 francs), but avowed his purpose of paying them, whatever they might be, and asked for a specified statement. An explanation, which may account for part of this, may be found in two dates. The peace of Amiens was signed the 25th of March, 1802; the declaration of the renewal of the war was dated the 18th of May, 1803."

Of the convention of 1800, Mr. Jefferson, in a letter to Mr. Madison on December 19, 1800, writes:

"Davie is here with the convention, as it is called; but it as a real treaty, without limitation of time. It has some disagreeable features, and will endanger the compromising us with Great Britain. I am not at liberty to mention its contents, but I believe it will meet with opposition from both sides of the house. It has been a bungling negotiation."

2 Randall's Jefferson, 577.

The effect of the "renunciation" introduced by Napoleon into the ratification is considered, *infra*, §§ 228, 248.

(*c*) TREATY OF 1803. (CESSION OF LOUISIANA.)

§ 148*b*.

The proceedings leading to this treaty are discussed, *supra*, § 72.

As to the Spanish grants in Louisiana after 1803, see *supra*, § 5.

For the effect of this treaty on the claims of citizens of the United States against their own Government for spoliations, see *infra*, § 248.

"The report that the British Government had cautioned ours not to pay the money for Louisiana, for that they meant to take possession of it, is utterly destitute of foundation. The British Government has, on the contrary, expressed its satisfaction with the cession, and, although the terms of it might not at the time be particularly known, yet as a price was to be presumed, and as the bargain was made *bona fide*, and was communicated prior to the commencement of hostilities, there can be no pretext whatever for complaint, nor is there the least ground for supposing that it will take place."

Mr. Madison, Sec. of State, to Mr. Paine (unofficial), Aug. 20, 1803; 2 Madison's Writings, 185.

"It is my duty to state, as a cause of very great regret, that very serious differences have occurred in this negotiation, respecting the construction of the eighth article of the treaty of 1803, by which Louisiana was ceded to the United States, and likewise respecting the seizure of the Apollo, in 1820, for a violation of our revenue laws. The claim of the Government of France has excited not less surprise than concern, because there does not appear to be a just foundation for it in either instance. By the eighth article of the treaty referred to, it is stipulated that, after the expiration of twelve years, during which time it was provided by the seventh or preceding article that the vessels of France and Spain should be admitted into the ports of the ceded territory without paying higher duties on merchandise or tonnage on the vessels than such as were paid by citizens of the United States, the ships of France should forever afterward be placed on the footing of the most favored nation. By the obvious construction of this article, it is presumed that it was intended that no favor should be granted to any power in those ports to which France should not be forthwith entitled; nor should any accommodation be allowed to another power on conditions to which she would not also be entitled on the same conditions. Under this construction, no favor or accommodation could be granted to any power to the prejudice of France. By allowing the equivalent allowed by those powers, she would always stand in those ports on the footing of the most favored nation. But if this article should be so construed as that France should enjoy, of right, and without paying the equivalent, all the advantages of such conditions as might be allowed to other powers, in return for important concessions made by them, then the whole character of the stipulations would be changed. She would not only be placed on the footing of the most favored nation, but on a footing held by no other nation. She would enjoy all the advantages allowed to them, in consideration of like advantages allowed to us, free from every and any cause whatever."

President Monroe, Fifth Annual Message, 1821.

"It was agreed by the article above-mentioned (Art VIII of the Louisiana treaty) that the ships of France should forever be treated upon the footing of the most favored nation in the ports of Louisiana.

"Vessels of certain foreign nations being now treated in the ports of the United States (including those of Louisiana) on the same footing with American vessels, in consideration of the American vessels being treated in the ports of those nations on the same footing with their own vessels, France has required that French vessels should, by virtue of the said article, be treated in the ports of Louisiana on the same footing with the vessels of those nations, without allowing on her part the consideration or reciprocal condition by virtue of which those vessels are thus treated.

"The United States contend that the right to be treated upon the footing of the most favored nation, when not otherwise defined, and when expressed only in those words, is that, and can only be that, of being entitled to that treatment gratuitously, if such nation enjoys it

gratuitously, and on paying the same equivalent, if it has been granted in consideration of an equivalent. Setting aside every collateral matter and subsidiary argument, they say that the article in question, expressed as it is, can have no other meaning, is susceptible of no other construction, for this plain and incontrovertible reason, that, if the French vessels were allowed to receive gratuitously the same treatment which those of certain other nations receive only in consideration of an equivalent, they would not be treated as the most favored nation, but more favorably than any other nation. And since the article must necessarily have the meaning contended for by the United States, and no other, the omission or insertion of words to define it is wholly immaterial, a definition being necessary only when the expressions used are of doubtful import, and the insertion of words to that effect in some other treaties, belonging to that class of explanatory but superfluous phrases of which instances are to be found in so many treaties.

"It might, indeed, have been sufficient to say that, in point of fact there was no most favored nation in the United States; the right enjoyed by the vessels of certain foreign nations to be treated in the ports of the United States as American vessels in consideration of American vessels receiving a similar treatment in the ports of those nations, not being a favor but a mere act of reciprocity.

"Let me also observe that the pretension of France would, if admitted, leave no alternative to the United States than either to suffer the whole commerce between France and Louisiana to be carried exclusively in French vessels, or to renounce the right of making arrangements with other nations deemed essential to our prosperity, and having for object not to lay restrictions on commerce but to remove them. If the meaning of the eighth article of the Louisiana treaty was such indeed as have been contended for on the part of France, the United States, bound to fulfill their engagements, must submit to the consequences, whatever these might be. But this having been proven not to be the case, the observation is made only to show that the United States never can, either for the sake of obtaining indemnities for their citizens or from their anxious desire to settle by conciliatory arrangements all their differences with France, be brought to acquiesce in the erroneous construction put upon the article in question."

Mr. Gallatin, minister to France, to Viscount de Chateaubriand, Feb. 27, 1823, 5 Am. St. Pap. (For. Rel.), 673.

As to the "favored-nation" clause, see *supra*, § 134.

Much unpublished correspondence in August and September, 1803, between Mr. Monroe and Mr. R. R. Livingston, in regard to the negotiations then pending with France, is in the Department of State among the Madison and Monroe papers; and also a series of private letters from Mr. Livingston to Mr. Madison, as to the differences between Mr. Livingston and Mr. Monroe and other circumstances of the negotiations.

In Hunt's life of Edward Livingston, 805, the success which attended the negotiation for the purchase of Louisiana is attributed to the skill with which Mr. R. R. Livingston seized the moment when Napoleon was most accessible, and when the circumstances were most propitious, to press the sale. But, as already noted, (*supra*, § 107,) the papers on file in the Department of State show that it was not until Mr. Monroe's arrival that final action took place. The motives on Napoleon's part were (1) the probability of a collision with the United States in case of his retention of Louisiana; (2) the probability of the seizure of Louisiana by the British in the approaching hostilities, should it be retained by France,

For other published papers on the same topic, see 2 Am. St. Pap. (For. Rel.), 506 *ff*.

An account of the negotiations preceding the purchase of Louisiana will be found in Edward Livingston's speech in May, 1825, on the Monroe refunding bill. Hunt's Life of Livingston, 805.—See also 1 Phill. Int. Law. (3 ed.), 380.

President Monroe's message of February 17, 1825, communicating correspondence as to interpretation of the eighth article of the treaty ceding Louisiana, is contained in House Doc. 403, 18th Cong., 2d sess., 640. 5 Am. St. Pap., 640.

The report in 1838 of the House Committee on Public Lands on the subject of the final adjustment of all claims to the land derived from the former Government of Spain in West Florida, as transferred to France, is given in House Rep. 818, 28th Cong., 2d sess. See also House Rep. 508, 22d Cong., 1st sess.

In the treaty of 1803 the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States regards this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract. The term "property," as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory as well as those which are executed.

Soulard *v.* U. S., 4 Pet., 511; Delassus *v.* U. S., 9 Pet., 117.

The stipulation in the treaty for the protection of the inhabitants in their property, &c., ceased to operate when Louisiana was admitted into the Union.

New Orleans *v.* Armas, 9 Pet., 223.

The treaty could not enlarge the constitutional powers of the United States, and those powers do not enable the United States to have or exercise that police control over public places in the State of Louisiana which belonged to the Crown of France or of Spain.

New Orleans *v.* U. S., 10 Pet., 662.

All Spanish grants in Louisiana, between November 3, 1762, and October 1, 1800, are held valid if made in accordance with Spanish law.

Strother *v.* Lucas, 12 Pet., 410; Les Bois *v.* Bramell, 4 How., 449; U. S. *v.* Moore, 12 How., 209.

Incomplete Spanish titles were not rendered complete by the treaty by which Louisiana was acquired; the Government of the United States succeeded to the powers and duties of the Crown of Spain as to confirmation of such titles, and where there were two adverse claimants might select between them and make a perfect title to one and exclude the other.

Chouteau *v.* Eckhart, 2 How., 344. See *supra*, §§ 4, *ff*.

The treaty confirmed titles as they existed under the local law.

McDonough *v.* Millaudon, 3 How., 693.

The treaty of cession was constitutional, and took effect on the day of its date, 30th April, 1803. Its subsequent ratification and the formal transfer of possession have relation to that date.

U. S. *v.* Reynes, 9 How., 127.

The treaty of St. Ildefonso, between Spain and France, of the 1st of October, 1800, deprived Spain of the power to make grants of land in Louisiana, if not after its date, certainly after 21st March, 1801.

Ibid.

All French grants of land in the Louisiana Territory between November 3, 1762, the date of the cession to Spain, and October 1, 1800, the date of the recession to France, are inoperative.

U. S. *v.* D'Auterive, 10 How., 609.

Under the treaty of 1803 with France, the United States always claimed to the Perdido River to the east, although the Spanish authorities kept possession of, and claimed sovereignty over, the territory between that river and the Mississippi (except the island of New Orleans), until 1810, when the United States took forcible possession of it. But grants made by Spain in the disputed territory whilst in possession thereof, were confirmed by act of Congress of June 22, 1860, though they were previously void.

U. S. *v.* Lynde, 11 Wall., 632.

Spanish grants made in the territory between the Mississippi and Perdido Rivers, after the treaty of St. Ildefonso, 1801, by which Spain ceded Louisiana to France were void, because after that time that territory did not belong to Spain. They were also declared void by the act of March 26, 1804.

Ibid.

Spain in ceding the Floridas to the United States, by the treaty of February 22, 1819, ceded only so much thereof as belonged to her, and hence did not cede the territory lying between the Mississippi and Perdido Rivers, which territory, though claimed by Spain, was treated by the United States as already ceded by France.

Ibid.

Under the provisions of the convention with France of 1803, the United States are not bound to protect demands for freight where individuals have transported articles for the French Government or for its citizens, since they are within no provision of the convention.

1 Op., 136 Lincoln, 1803.

(*d*) SUBSEQUENT TREATIES.

§ 148*c*.

The convention with France of June 24, 1822, with the accompanying documents, as sent by President J. Q. Adams, on December 10, 1822, is given in Senate Ex. Doc. 353, 17th Cong., 2d sess. 5 Am. St. Pap. (For. Rel.), 149.

The proceedings in 1833 in the French House of Deputies, on the subject of the treaty of 1831 between France and the United States are given in House Ex. Doc. 2, 23d Cong., 2d sess.

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.

"By the treaty of July 4, 1831, France was to pay 25,000,000 francs in full satisfaction of the American claims; the United States were to pay 1,500,000 francs in satisfaction of certain French claims; the United States were to reduce the duties on French wines; and France, in consideration of the latter agreement, was to relinquish its claims and reclamations respecting the 8th article of the treaty of cession of Louisiana.

"The ratifications of this convention were exchanged on the 2d of February, 1832, and on the 13th of the following July Congress passed an act to carry it into effect. It provided for a commission to take proof of the claims, and also for the agreed reduction of duties upon the wines of France. Under this commission the claims which had been referred against the Netherlands as well as some which had been preferred against Naples and Spain were proved and allowed against France.

"The first installment under this treaty was to be paid at the expiration of one year next following the exchange of the ratifications; that is, it became payable on the 2d day of February, 1833. But no provision was made for its payment; and on the 18th of April, 1834, the French Chamber of Deputies, by a vote of 176 to 168, refused to make the appropriations necessary to carry out the provisions of the treaty. (See *supra*, §§ 133 *ff.*) At the opening of the 2d session of the 23d Congress (December, 1834), President Jackson, after stating in detail successive neglects of France to make or provide for the payments under this treaty, said: 'The executive branch of this Government has, as matters stand, exhausted all the authority upon the subject with which it is invested, and which it had any reason to believe could be beneficially employed. The idea of acquiescing in the refusal to execute the treaty will not, I am confident, be for a moment entertained by any branch of this Government; and further negotiation upon the subject is equally out of the question.' After a discussion in the Senate, in which Clay, Webster, Buchanan, Calhoun, Clayton, and others took part, it was voted unanimously, 'it is inexpedient at present to adopt any legislative measures in regard to the state of affairs between the United States and France.' The President, on the 7th of the following February, transmitted to the House of Representatives further correspondence from Edward Livingston, then minister at Paris; and again on the 25th of the same month still further correspondence, by which he said, 'It will be seen that I have deemed it my duty to instruct Mr. Livingston to quit France with his legation, and return to the United States, if an appropriation for the fulfillment of the convention shall be refused by the Chambers.' The next day the Committee of Foreign Affairs reported to the House respecting the 'relations with France.' There was a majority report and a minority report. Cambreleng presented the former; the latter was signed by Edward Everett, Robert P. Letcher, and R. Coulter. Cambreleng opened the discussion on Saturday, the 28th of February, with a short speech. John Quincy Adams followed at length. Archer, Pickens, Cambreleng, Everett, Wise, the best talent of the House, participated in the debate. It closed at night by

the adoption of a resolution that in the opinion of the House the treaty of July 4, 1831, should be maintained and its execution insisted on, and that preparations ought to be made for any emergency growing out of our relations with France.

"Livingston left Paris under instructions from the President, and was followed by Barton, whom he had left as chargé d'affaires. This caused the withdrawal from Washington of Pageot, the French minister, and the complete rupture of diplomatic relations. (See *infra*, § 318.)

"On the 8th of February, 1836, the President informed Congress that the mediation of Great Britain had been offered to adjust these differences. Some of the proceedings which had taken place in the Chamber of Peers in Paris may be found in a message of the 15th of that month. On the 22d the President was able to announce to Congress that the French Government had determined to execute the treaty, and that the mediation had therefore become unnecessary. (*Supra*, § 49; *infra*, § 318.) The payments of the installments were duly made. Thenceforward diplomatic relations were resumed, and the last difficulty with France, arising from the wars of Napoleon, disappeared."

Mr. J. C. B. Davis, Notes, &c. See the proceedings on this treaty noticed *infra*, § 318; see also § 228.

As to privileges of consuls under consular convention, treaty of 1853, see *supra*, § 98.

By the 7th article of the consular convention with France of February 23, 1853, the President engaged to recommend to the particular States "that if, pursuant to their then existing laws, French subjects were not then allowed to hold real estate in any State, that right might be conferred on them."

Mr. Fish, Sec. of State to the governor of Maine, May 9, 1870. MSS. Dom. Let.

The 7th article of the treaty with France of 1853 has relation only to rights of inheritance subsequently acquired.

Prevost *v.* Greenaux, 19 How., 1.

(11) GERMANY.

§ 149.

The treaty of July 11, 1799, between the United States and Prussia, which was preceded by a correspondence as to neutral rights, elsewhere given (*infra*, §§ 342 *ff.*), reaffirmed the rule of free ships making free goods. This treaty, in connection with that of 1785, is discussed in 1 Lyman's Diplomacy of the United States, chap. v.

The treaty of 1828 with Prussia makes provision for the disposition and succession of both personal and real estate in each country by the citizens or subjects of the other. Of this provision Mr. Cushing, when Attorney-General, held that it is "a stipulation constitutional in substance and form, which, as such, is the supreme law of the land, and which abrogates any incompatible law of either of the States."

8 Op., 417, Cushing, 1857; but see *supra*, § 138.

Where a detention of a Prussian vessel, in the port of New Orleans, during the late civil war, was caused by her resistance to the orders of the properly constituted authorities, whom she was bound to obey, she preferring such detention to a clearance upon the conditions imposed, it was ruled that her owner, a subject of Prussia, is not entitled to any damages against the United States under the law of nations or the treaty with that power of 1799.

U. S. *v.* Diekelman, 92 U. S., 520.

Article 10 of the treaty with Prussia of 1828 provides that the consuls, vice-consuls, and commercial agents of each party "shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities," subject to the right of the contending parties "to resort, on their return, to the judicial authority of their country," and to the right of the consuls, vice-consuls, and commercial agents to require the assistance of the local authorities "to cause their decisions to be carried into effect or supported." The crew of a Prussian vessel sued *in rem*, in admiralty, in the district court, to recover wages alleged to be due to them. The master of the vessel answered, denying the debt, invoking the protection of said treaty, denying the jurisdiction of the court, and averring that the claim for wages had already been adjudicated by the Prussian consul at New York. The consul also protested formally to the court against the exercise of its jurisdiction. The case was tried in the district court, and it appeared that the consul had adjudicated on the claim for wages. The district court decreed in favor of the libellants. It was held that the district court had no jurisdiction of the case.

The Elwine Kreplin, 9 Blatch., 438. As to consular jurisdiction, see *supra*, § 124.

"Overtures for a treaty of commerce and navigation were made to John Adams by M. de Thulemeier, Prussian envoy to The Hague, on the 18th of February, 1784. Adams replied that he 'could do nothing but in concurrence with Mr. Franklin and Mr. Jay, who were at Paris, but that he thought he could answer for the good disposition of those gentlemen, as well as of his own.' Franklin and Jay concurred in desiring to negotiate such an instrument, and Adams proposed to Thulemeier that the then recently negotiated treaty with Sweden should be taken as the model of the proposed instrument. Thulemeier adopted the suggestion, and in the following April sent Adams a projét based upon it, which Adams transmitted to the President of Congress.

"On the 7th of the following June Adams transmitted to the President of Congress an account of the negotiations, with his observations upon the Prussian projét. On the 3d of that month, however, Adams, Franklin, and Jefferson had been invested by Congress with a general power to conclude treaties of amity and commerce with various powers in Europe, among others with Prussia; and they notified Thulemeier

that they were ready 'to consider and complete the plan of a treaty' which he had already transmitted.

"Thulemeier communicated this to his Government, and received a 'full power to conclude a treaty of commerce and friendship between Prussia and the United States.' The negotiations were conducted with great rapidity under the circumstances. Franklin left Passy on the 12th of July, 1785, for America. The French text of the treaty at the time of his signature had not reached Paris, and he signed only the English text. The French draft reached Paris several days later, and was copied, by Jefferson's directions, into the instruments which Franklin had signed. Then Jefferson signed the documents, and Short took them to Adams, in London, for his signature. Short then went to The Hague to secure Thulemeier's signature to the treaty, and its exchange.

"On the 11th of July, 1799, when this was about to expire by its own limitation, a new treaty was concluded by John Quincy Adams, at Berlin, which his father, the President, communicated to Congress on the 22d of November, 1800. This also expired in ten years from the exchange of ratifications, in the midst of the wars of Napoleon.

"In 1828 a new treaty of amity and commerce with Prussia was concluded, which is still in force. The fourteenth article makes provision for the disposition and the succession of both personal and real estate in each country by citizens of the other. Attorney-General Cushing said of this, there 'is a stipulation of treaty, constitutional in substance and form, which, as such, is the supreme law of the land, and which abrogates any incompatible law of either of the States. * * * In the circumstances suggested by the Baron von Gerolt, it is an act of mere duty and of simple good faith on our part to assure him that such is the law.'

"This treaty conferred upon consuls jurisdiction over disputes between masters and seamen. President Polk, in his annual message, December 2, 1845, said, 'The Prussian consul at New Bedford in June, 1844, applied to Mr. Justice Story to carry into effect a decision made by him between the captain and crew of the Prussian ship Borussia, but the request was refused on the ground that without previous legislation by Congress the judiciary did not possess the power to give effect to this article of the treaty. * * * I have deemed it proper, therefore, to lay the subject before Congress, and to recommend such legislation as may be necessary to give effect to these treaty obligations.' No such act was passed until June 11, 1868. (See *supra*, § 124.)

"On the outbreak of the Franco-German war, the German minister at Washington informed Mr. Fish that private property on the high seas was to be exempted from seizure by German vessels without regard to reciprocity. Mr. Fish replied, 'The Government of the United States receives with great pleasure the renewed adherence of a great and enlightened German Government to the principle temporarily established by the treaty of 1785, and since then advocated by this Government whenever opportunity has offered.' (See *infra*, § 342.)

"Before the formation of the North German Union questions were arising with Prussia respecting the compulsory enlistment in the Prussian army of persons who had become naturalized as citizens of the United States. These questions were intended to be set at rest by the treaty of naturalization with the North German Union. Some doubts still remaining as to the proper construction of that treaty, Prince Bismarck said, in the Diet, 'The gentleman who has last spoken fears

that a person who has lived five years in America, and been naturalized there, may yet, on his return here, be held to military duty. This apprehension I can designate as perfectly and absolutely unfounded. The literal observation of the treaty includes in itself that those whom we are bound to acknowledge as American citizens cannot be held to military duty in North Germany. That is the main purpose of the treaty. Whosoever emigrates *bona fide* with the purpose of residing permanently in America shall meet with no obstacle on our part to his becoming an American citizen, and his *bona fides* will be assumed when he shall have passed five years in that country, and, renouncing his North German nationality, shall have become an American citizen."

Mr. J. C. B. Davis, Notes, &c.

The naturalization treaties with Germany are considered in another chapter.

Infra, §§ 173, 178, 179.

Under the treaty with Prussia, of 1852, the forging of checks on the communal chest of Breslau is a crime for which the mutual extradition of fugitives from justice is stipulated.

6 Op., 761, Cushing, 1854. *Infra*, § 270.

The provisions of the treaty of 1828 between the United States and Prussia, for the arrest and imprisonment of deserters from public ships and merchant vessels of the respective countries, applies to public vessels sailing under the flag of the North German Union, and deserters from such vessels.

12 Op., 463, Evarts, 1868.

A citizen of the North German Confederation who becomes a naturalized citizen of the United States must have had an uninterrupted residence of five years in the United States before he is entitled to the immunities guaranteed by the treaty with the Confederation of 1868. The recital contained in the record of the naturalization proceedings that he had resided continuously in this country for more than five years will not be regarded by the United States as conclusive as to the fact so recited.

13 Op., 376, Ackerman, 1871. See *infra*, §§ 173 *ff.*

A crime committed by a Prussian subject in Belgium, although justiciable in Prussia, does not come within the provisions of the extradition treaty between the United States and Prussia of 1852.

14 Op., 281, Williams, 1873. See *infra*, §§ 271 *ff.*

A Prussian subject by birth emigrated to the United States in 1848, became naturalized in 1854, and in the following year had a son born in Saint Louis, Mo. Four years after the birth of his son he returned to Germany with his family, including this infant child, and became domiciled at Wiesbaden, in Nassau, where he has continuously resided. In 1866 Nassau became incorporated into the North German Confederation. When the son reached the age of twenty years he was called

upon by the German Government to report for military duty. Thereupon the intervention of the legation of the United States was invoked on the ground that the son was a native American citizen.. Under article six of the naturalization treaty of 1868, between the North German Union and the United States, and according to the American rule declared in section 1999 of the Revised Statutes, the father renounced his naturalization in America and became a German subject. By virtue of the German laws, his son, being a minor, also acquired German nationality. Being domiciled with his father, and being as a minor, subject to him, according to both German and American law, and receiving German protection, and declining to give any assurance of intention to return to and reside in the United States, the son during his minority, when in Germany, cannot invoke the aid of the Government of the United States. But when he reaches the age of twenty-one years he may elect whether he will return to and take the nationality of his birth, with its duties and privileges, or retain the nationality acquired by the act of his father.

15 Op., 15, Pierrepont, 1875. See on this topic *infra*, §§ 183 *ff*.
As to naturalization treaties with Germany see *infra*, §§ 171 *ff*.
As to extradition treaties, see *infra*, §§ 268 *ff*.

The presumption of abandonment of adopted citizenship in the United States created, under treaty, by a residence in Germany of over two years, is only *prima facie*, and may be rebutted by proof of an intention to return to the United States.

Infra, § 179.

(12) Great Britain.

(*a*) treaty of 1783. peace.

§ 150.

The treaty of peace was a treaty of partition of the British Empire. The sovereignty of the United States over its own territory was recognized by Great Britain; the sovereignty of Great Britain over her own territory was recognized by the United States.

Supra, § 6; *infra*, § 302; see McIlvaine *v* Coxe, 4 Cranch, 409, cited *infra* in this connection. See App., vol. iii, § 150.

"On the 3d day of September, 1783, Adams, Franklin, and Jay signed at Paris the definitive treaty of peace between the two powers. The official correspondence connected with the negotiation of this treaty has been printed under the care of Mr. Sparks.

"It was provided by the seventh article of each treaty that 'His Britannic Majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons, and fleets from the said United States, and from every port, place, and harbor within the same.'

"But when the British forces were withdrawn from New York, on the 25th of the November following the signature of the definitive treaty,

they took with them, or sent in advance of their withdrawal, 3,000 negroes, in violation of the treaty; and when Jay was commissioned in 1794 to proceed to London to negotiate the treaty which bears his name, British troops still occupied Detroit, Mackinaw, Fort Erie (Buffalo), Niagara, Oswego, Oswegatchie, Point au Fer, and Dutchman's Point, notwithstanding the agreement to evacuate them."

Mr. J. C. B. Davis, Notes, &c.

The negotiation of this treaty is detailed in 1 Lyman's Diplomacy of the U. S., chap. iv, and that of Jay's treaty in the same volume, chap. vi. See also Mr. Hamilton to Governor Clinton June 1, 1783. 8 Lodge's Hamilton, 119.

The treaty of 1783 did not create the boundaries of the then United States or the national rights arising therefrom. It merely recognized them as they then existed. This is eminently the case with the northeastern fisheries, which the colonies, in connection with the parent Government, had conquered from France, and which were the appurtenances of the colonies, in joint possession with the parent state. The United States continued, after the peace, to hold these fisheries in common with Great Britain, subject only to such mutual concessions as the treaty expressed.

Infra, §§ 302 *ff.*

In the London Diplomatic Review for October, 1872 (vol. xx, 231), is the following: "The astute and resolute representatives of the United States have on every occasion shown a marked superiority over ours in framing and interpreting treaties, and on the assertion or infringement of rights in which British interests were concerned; but in no instance have they given a more signal proof of their skill in this regard than they did in that portion of the treaty of 1783 which purported to define the territorial boundary between the mother country and her emancipated colonists."

As to treaty of peace with Great Britain, see 1 John Adams's Works, 294, 355, 359; 3 *ibid.*, 74, 78, 259, 281, 290, 299; 7 *ibid.*, 119, 143, 165, 177, 238, 306, 431, 554, 562, 570, 606, 610, 639, 645, 649.

As to its signature and ratification, see 3 John Adams's Works, 348, 363–683; 8 *ibid.*, 50, 54, 57, 72–92, 115, 134, 137, 143, 154, 165, 177, 180, 196, 204, 358; 9 *ibid.*, 521.

The correspondence in 1792 between Mr. Hammond, the first British minister to the United States, and Mr. Jefferson, Secretary of State, on the alleged non-execution of the treaty of peace so far as concerns confiscation of loyalist's estates and the right of British creditors to recover debts in the United States is given in 1 Am. St. Pap. (For. Rel.), 193 *ff.*

Gouverneur Morris' letters to President Washington, when on a confidential agency of inquiry in England in 1790, are in 1 Am. St. Pap., 120 *ff.*

By the fourth article of the definitive treaty of peace between the United States and Great Britain, of the 3d of September, 1783, British creditors were enabled to recover debts previously contracted to them by our citizens, notwithstanding a payment of the debt into a State treasury had been made during the war, under the authority of a State law of sequestration.

Ware *v.* Hylton, 3 Dall., 199; State of Georgia *v.* Brailsford, 3 Dall., 4, 5. See discussion in 2 Phill. Int. Law (3d ed.), 123.

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.

On the execution of the treaty of 1783, acknowledging the independence of the United States, all persons, whether born in the United States or otherwise, who adhered to the United States, were absolved from their allegiance to Great Britain, while those who adhered to Great Britain were British subjects.

McIlvaine *v.* Coxe, 4 Cranch, 209.

The several States which compose the Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign States, and did not derive them from concessions of the British King. The treaty of peace was a recognition, not a grant, of the independence of those States. Hence the laws of the several State governments passed after the Declaration of Independence were the laws of sovereign States, and as such obligatory upon the people of each State.

Ibid. See *supra*, § 6.

Article 5 of the treaty of peace with Great Britain of 1783 saved the lien of a mortgage upon confiscated lands which at the time remained unsold.

Higginson *v.* Mein, 4 Cranch, 415.

The "interest in lands by debts" protected by article 5 of the treaty of peace with Great Britain of 1783, must be an interest held as security for money at the time of the treaty.

Owings *v.* Norwood's Lessee, 5 Cranch, 344. See App., vol. iii, § 150.

As to effect of the treaty of peace of 1783 with Great Britain, and of treaty of 1794, in protecting titles of British subjects to land in Virginia, see Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 603; Craig *v.* Bradford, 3 Wheat., 594.

The sixth article of the treaty of peace of 1783 protected from forfeiture, by reason of alienage, lands then held by British subjects.

Orr *v.* Hodgson, 4 Wheat., 453.

The treaties of 1783 and 1794 only protected titles in existence at the time the treaties were proclaimed, and did not operate on titles subsequently acquired. But in the case of titles existing at the proclaiming of the treaties actual possession was not necessary.

Blight *v.* Rochester, 7 Wheat., 535. See Shanks *v.* Dupont, 3 Pet., 242.

British subjects born before the Revolution are incapable of inheriting lands in the United States, save by force of some treaty.

Blight *v.* Rochester, 7 Wheat., 535.

Corporations, under the treaties with Great Britain of 1783 and 1794, are entitled to the same rights as are natural persons.

Society for Propag. Gospel *v.* New Haven, 8 Wheat., 464.

All British grants of land in the United States made subsequent to the Declaration of Independence are inoperative under the treaty of 1783.

Harcourt *v.* Gaillard, 12 Wheat., 523; *supra*, § 5*a*.

Under the treaty of 1783 with Great Britain, all those, whether natives or otherwise, who then adhered to the American States, were virtually absolved from all allegiance to the British Crown; all those who then adhered to the British Crown were deemed and held subjects of that Crown.

Shanks *v.* Dupont, 3 Pet., 242.

The United States, by the treaty of 1783 with Great Britain, acquired the sovereignty of Michigan, which was part of the French domain prior to the conquest by Great Britain in 1750, and as an incident of such sovereignty succeeded to the prerogatives of the King of France in dealing with seignioral estates for a forfeiture for non-fulfillment of the conditions of the fief.

U. S. *v.* Repentigny, 5 Wall., 211.

The term "prosecutions," employed in the sixth article of the treaty with Great Britain of 1783, imports a suit against another in a criminal cause, such prosecutions being conducted in the name of the public, the ground of them being distinctly known as soon as they are instituted, and being always under the control of the Government.

1 Op., 50, Bradford, 1794.

The correspondence between Mr. Jefferson and Mr. Hammond opened with a formal statement by Mr. Jefferson, on November 29, 1791, of the grievances of the United States on the non-performance of the British stipulations in the treaty of 1783. "On the 30th of November Hammond replied to Jefferson's note thus: 'With respect to the non-execution of the seventh article of the definitive treaty of peace between His Britannic Majesty and the United States of America, which you have recalled to my attention, it is scarcely necessary for me to remark to you, sir, that the King, my master, was induced to suspend the execution of that article, on his part, in consequence of the non-compliance, on the part of the United States, with the engagements contained in the fourth, fifth, and sixth articles of the same treaty. These two objects are, therefore, so materially connected with each other as not to admit of separation, either in the mode of discussing them, or in any subsequent arrangements which may result from that discussion.'

"Jefferson met this on the 15th of December by a note stating briefly the American position as to the British infractions of the treaty and producing evidence in its support. This drew from Hammond an elaborate reply on the 5th of March, 1792, in which he contended (1) that the United States had failed to execute the 4th article of the treaty, by not

preventing the placing of impediments in the way of the recovery, in sterling, of debts due to British subjects; (2) that interest had not been allowed on judgments in favor of British creditors; and (3), that article 5 had not been carried into effect by the United States, inasmuch as confiscated estates had not been restored; and that therefore 'the measure that the King has adopted (of delaying his compliance with the 7th article of the treaty) is perfectly justifiable.' To this Jefferson, on the 29th of May, 1792, replied, (1) that impediments, within the meaning of the treaty, had not been thrown in the way of the collection of British debts in the United States; (2) that interest is not an integral part of a debt under British and American law, and therefore it was not embraced in the treaty; (3) that the United States had only undertaken in the treaty to recommend the States to restore confiscated estates, and had fully complied with that agreement; and he showed conclusively that it was understood both by the ministry and by both houses of Parliament, when the treaty was negotiated, that the American plenipotentiaries not only would not agree to restore the confiscated estates, but expressed the opinion that the States themselves would not restore them, even if recommended by Congress to do so; (4) that the British infractions of the treaty, so far from being the result of alleged infractions by the United States, preceded them, and were in no way dependent upon them.

"More than a year elapsed without a reply. Jefferson then, on the 19th of June, 1793, wrote Hammond, asking when one might be expected. 'The subject,' he said, 'was extensive and important, and therefore rendered a certain degree of delay in the reply to be expected. But it has now become such as naturally to generate disquietude. The interests we have in the western posts, the blood and treasure which their detention costs us daily, cannot but produce a corresponding anxiety on our part.' Hammond replied that as soon as he should receive instructions the reply should be transmitted, and added, 'There is one passage in your letter of yesterday, sir, of which it becomes me to take some notice. The passage I allude to is that wherein you mention "the blood and treasure which the detention of the Western posts costs the United States daily." I cannot easily conjecture the motives in which this declaration has originated. After the evidence that this Government has repeatedly received of the strict neutrality observed by the King's governors of Canada, during the present contest between the United States and the Indians, and of the disposition of those officers to facilitate, as far as may be in their power, any negotiations for peace, I will not for a moment imagine that the expression I have cited was intended to convey the insinuation of their having pursued a different conduct.'

"Jefferson made no response to this. In a few months he again asked Hammond whether he was prepared to reply on this subject of the infractions of the treaty. No answer was ever made.

"In the autumn of 1793 a new question of difference arose. The admiralty instructions to British ships of war and privateers, issued in June, 1793, ordered the seizure of all neutral vessels laden with corn, flour, or meal, destined for French ports, and of all neutral vessels, except those of Denmark and Sweden, attempting to enter any blockaded port. As Denmark, Sweden, and the United States were the principal neutral maritime powers, there was no question as to the vessels against which the latter provision was aimed. When complaint was made of the order to seize vessels laden with provisions, it was justified by Great

Britain on the assumption that provisions were contraband of war. Edmund Randolph, Jefferson's successor as Secretary of State, met this by saying: 'We have labored to cultivate with the British nation perfect harmony. We have not attempted by a revival of maxims which, if ever countenanced, are now antiquated, to blast your agriculture or commerce. To be persuaded, as you wish, that the instructions of the 8th of June, 1793, are in a conciliatory spirit, is impossible. And be assured, sir, that it is a matter of sincere regret to learn the intention of your Government to adhere to them, notwithstanding our representations, which utter, as we flatter ourselves, the decent but firm language of right.'

"Under such circumstances President Washington, on the 16th of April, 1794, sent a message to the Senate, in which, referring to the 'serious aspect of our affairs with Great Britain,' he said: 'But, as peace ought to be pursued with unremited zeal, before the last resource, which has so often been the scourge of nations, and cannot fail to check the advancing prosperity of the United States, is contemplated, I have thought proper to nominate, and do hereby nominate, John Jay, as envoy extraordinary of the United States to his Britannic Majesty.'

"The nomination was confirmed by a vote of 18 to 8. Jay's instructions were dated the 6th of May, 1794. He sailed from New York on the 12th of the same month."

Mr. J. C. B. Davis, Notes, &c.

Almost immediately after this conciliatory step was taken, the British governor of Canada, Lord Dorchester, made a speech, unfriendly in its character to the United States, to Indians then aroused against the United States, and three companies of a British regiment went to the foot of the rapids of the Miami, in the southern part of what is now the State of Ohio, to build a fort there. When complaints were made of these hostile acts the British minister at Washington justified both as defensible preparations for an actual state of war about to begin between the two nations, and he retorted by complaining of the fitting out of French privateers in American ports, and of the 'uniformly unfriendly treatment which His Majesty's ships of war * * * experienced in the American ports.' President Washington, in transmitting the correspondence to both Houses of Congress, said: 'This new state of things suggests the propriety of placing the United States in a posture of effectual preparation for an event which, notwithstanding the endeavors making to avert it, may, by circumstances beyond our control, be forced upon us.'"

Ibid. See *supra*, §§ 107, 131 *ff.*

(*b*) JAY'S TREATY (1794).

§ 150*a*.

The full text of the instructions to Mr. Jay, and of much minor correspondence relative thereto, will be found in 1 Am. St. Pap. (For. Rel.), 472 *ff.* Mr. Jay's report of his proceedings in England is in the same volume, 476 *ff.* The projects and counter projects of the negotiators are given in same volume, 486 *ff;* see same volume, 705, for Mr. Randolph's correspondence with Mr. Jay.

The policy of President Washington in the negotiations which led to Jay's treaty is given as follows in instructions of September 20, 1794, from Mr. Randolph, Secretary of State, to Mr. Jay: "It is his (the President's) wish that the characteristics of an American minister should be marked on the one hand by a firmness against improper compliances, and on the other by sincerity, candor, and prudence, and by a horror of finesse and chicanery. These ideas, however, will not oppose those firm and temperate representations which you meditate should your present plan fail. *For it is fair and indispensable in the event of a rupture to divide the nation from the Government.*"

The treaty appears in 1 Am. St. Pap. (For. Rel.), 520 *ff.*

Some of the disputes in construction of Jay's treaty are noticed in 1 John Adams's Works, 471, 477, 481; 9 *ibid.*, 18, 27, 36, 40, 74, 138.

Mr. Pickering's instructions to Mr. Pinckney of Jan. 16, 1797, as to this treaty, are published in 1 Am. St. Pap. (For. Rel.), 561.

The proceedings of the Senate and House of Representatives respectively, when acting on Jay's treaty, are discussed in a previous section. *Supra*, § 131 *ff.* See also, 3 Life of Pickering, 174.

Under article 18 of this treaty an intention to enter a blockaded port is not cause for condemnation.

Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185.

Jay's treaty provided that British subjects then holding lands in the Territories of the United States may continue to hold them according to their respective titles. It has been held by the Supreme Court of the United States that this provision is part of the supreme law of the land, being a constitutional exercise of the treaty-making power.

Fairfax *v.* Hunter, 7 Cranch, 603. See *supra*, § 138.

Under the 9th article of Jay's treaty, by which it is provided that British subjects holding lands in the United States, and their heirs, so far as respects those lands and the remedies incident thereto, should not be considered as aliens, the parties must show that the title to the land for which the suit was commenced was in them or their ancestors, when the treaty was made.

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

A defeasible title to a freehold estate in Virginia being vested in a British subject during the Revolution, and capable of being divested, by the laws of Virginia, only by inquest of office, or a legislative act equivalent thereto, was protected and confirmed by the 9th article of the treaty of 1794, between the United States and Great Britian, though the holder had never become a citizen.

Craig *v.* Bradford, 3 Wheat., 594.

To the same effect as the treaty of 1783 was the 9th article of the treaty of 1794, which also provided that, as to the lands held under it, neither the British subjects, nor their heirs should be regarded as aliens. But the term "heirs" was not meant to include any persons

other than such as were British subjects or American citizens at the time of the descent cast.

Orr *v.* Hodgson, 4 Wheat., 453.

As to construction of the treaty of 1794, so far as concerns title of British subjects to lands, see further, Harden *v.* Fisher, 1 Wheat., 300, reversing S. C., 1 Paine, 55; Orr *v.* Hodgson, 4 Wheat., 453; Blight *v.* Rochester, 7 Wheat., 535; Society for Propagation of Gospel *v.* Wheeler, 2 Gall., 105.

The commissioners appointed in pursuance of the 5th article of the treaty of 1794 must agree in their decisions, and must all subscribe their names and attach their seals thereto. In case the two original commissioners appointed under said article disagree in the choice of a third, each is to propose one person, and of the two names so proposed, one shall be drawn by lot, and neither of said commissioners has a *discretionary* power to withhold his nominee or to refuse to draw by lot for the third commissioner.

1 Op., 66, Lee, 1796.

To insure the speedy and due execution of the 6th article of the treaty of 1794, public officers should, when requested, furnish authenticated copies of documents in their custody, and should assist in bringing forward testimony according to the duties of their several stations; and individuals should not refuse to give testimony.

1 Op., 82, Lee, 1798.

By the 27th article of the treaty of 1794, a requisition from the British minister is not authorized unless the persons demanded are charged with murder or forgery committed within the territorial jurisdiction of Great Britain.

1 Op., 83, Lee, 1798. See *infra*, § 271.

The provision in the 23d article of the treaty that "the ships of war of each of the contracting parties shall at all times be hospitably received in the ports of the other; their officers and crews paying due respect to the laws and Government of the country," is merely declaratory of the usage of nations, that hospitality, which includes protection, is to be enjoyed upon condition that the laws and Government of the country are respected.

1 Op., 87, Lee, 1799.

Under the treaty of 1794 goods and merchandise carried from any place in the territory of His Britannic Majesty on the continent of America, by the subjects of Great Britain, into any of the northern districts of the United States, are subject to the same duties which would be payable by our citizens on the same goods imported from the same place in American ships into the Atlantic ports of the United States.

1 Op., 155, Breckinridge, 1806.

The provision in the 3d article of the treaty, relating to the duties on goods and merchandise, does not extend to tonnage duties, nor does the treaty extend any dispensation to the subjects of Great Britain from the laws of the United States, which regulate the trade and intercourse of our own citizens with the Indian tribes.

Ibid.

Under the second article of the treaty of 1794 a British subject, held to have elected to become a citizen of the United States by remaining therein, without having declared his intention to continue to be a British subject, did not become, *ipso facto*, a citizen of the United States. He could do so only by becoming naturalized in accordance with section 2 of the act of 29th January, 1795 (1 Stat., 414).

5 Op., 715, Appendix, Wirt, 1819. See *infra*, §§ 187–8.

"Your letter of the 10th instant has been received. It asks whether there was in 1872 any treaty between the United States and Great Britain relative to the inheritance of lands situated in this country by British subjects.

"The only provision found in any treaty between the United States and Great Britain touching this point is in the ninth article of the treaty of 1794, whereby it was agreed that 'British subjects who now hold lands in the Territories of the United States, and American citizens who now hold lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens.'

"The operation of this stipulation is limited to lands held in the United States and Great Britain respectively, in 1794, and as to the subsequent title to lands so held at that time, the effect of the treaty may be deemed permanent.

"Permit me to refer you to the cases of Shanks and others against Dupont and others, 3 Pet., 242, and to New York *v.* Clarke, 3 Wheat., 1, for legal decisions as to the construction of the 9th article of the treaty.

"The treaty of 1794, however, is held by the highest authorities to have actually lapsed by reason of the subsequent state of war in 1812–'15, and neither the treaty of Ghent nor any treaty between the two countries since then has re-enacted its provisions in whole or part.

"There is, therefore, no treaty engagement of any character between Great Britain and the United States, which would give to the subjects or citizens of the respective countries the original right to acquire since 1794 any real property by inheritance or purchase, except

in accordance with the laws of the State or Territory where the property is situated."

Mr. Bayard, Sec. of State, to Messrs. L. and E. Lehman, June 23, 1885. MSS. Dom. Let.

The objects in view in opening a negotiation with Mr. Jay, as special envoy, were as follows:

(1) The vacating by the British authorities of the border posts on United States territory, including Fort Erie, Detroit, Oswego, and Michilimackinac, which they still held in defiance of the treaty of peace, and which they used, not merely to retard the progress of United States settlement in those quarters, but to keep the adjacent Indian tribes in subjection to Great Britain and in hostility to the United States. *Infra*, § 150. See, also, *supra*, § 107.

(2) The recognition of the maxim "Free ships make free goods."

(3) The establishing of a restricted system of contraband.

(4) The placing of Great Britain on a position of equality with France so far as concerns belligerent rights, and so far as it could be done consistently with the treaty with France.

(5) The surrender of impressment.

(6) The opening of the West India trade.

(7) The surrender of the rule that no trade could be allowed to a neutral in war which he could not carry on in peace.

(1) The first of these proposed concessions was the only one which was obtained, and it was granted in a way peculiarly ungracious. The treaty of peace required an immediate surrender of these posts. Great Britain refused to surrender them, and made them the basis of unjustifiable encroachments on the United States. Jay's treaty not only condoned this outrage, but permitted the posts to be held by Great Britain until June, 1796.

(2) So far from "free ships and free goods" being recognized, it was agreed, in gross contravention of the treaty of alliance with France, that French goods in United States merchant vessels should be subject to seizure by Great Britain.

(3) So far from the list of contraband being restricted, it was expanded so as to include "timber for ship-building, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted;" and this was followed by the statement that provisions could be confiscated, subject to a right on the part of the owners to claim payment at a rate to be fixed at the British port to which the vessel was taken, a right which, of course, turned out to be illusory.

(4) So far from Great Britain being raised by the treaty to equal privileges with France, she was, by virtue of her maritime supremacy, given advantages over France which virtually destroyed those to which France was entitled by treaty. Thus, while France, by treaty, was precluded from seizing British goods when in United States vessels, Great Britain, on the other hand, was permitted to seize French goods, or goods going to France, on United States vessels, and even to seize United States provisions going on United States vessels to France or French colonies, as contraband. The stipulation for compensation for such seizures, even if it had been carried out, which it was not, would have been no relief to France, since the result was to

advance the British scheme of starving the French population, provisions sent from the United States to France and to French colonies being in this way carried to England. Article XXI, also, precluding citizens of the United States from serving under France, and providing that if a citizen of the United States should take a commission to act as a French privateer he could be treated by Great Britain as a pirate, was as much in conflict with the law of nations as with the treaty of alliance with France. And this, as well as the prior articles, was in conflict with the guarantee given by the United States, for a consideration unquestionably sufficient, of the West India possessions of France.

(5) Impressment was not surrendered.

(6) Although Jay's instructions required him to sign no treaty which did not in some measure open the West India trade, the treaty he signed opened that trade only to United States vessels of 70 tons, whose cargoes had been received in ports of the United States. This concession, however, was more than neutralized by the admission of British vessels of any tonnage to the United States ports for West India commerce; and then it was made useless by the condition that United States vessels should not transport to any foreign country except Great Britain, sugar, cotton, coffee, or molasses. The only excuse offered for this last extraordinary condition was that Mr. Jay was not aware (though Lord Grenville, who negotiated the treaty with him, was) that cotton was, or could be, produced in the United States.

(7) The rule that there should be no trade by the United States in war with ports with which she could not trade in peace was not surrendered.

It is true that the treaty provided for a commission to determine the indemnity due for prior British spoliations of United States commerce. But for this a price was paid vastly exceeding the value of any spoliation indemnity that could possibly have been received. Aside from the enormous concessions above stated we bound ourselves to assume in a mass British debts, many of which were incapable of proof. It is true that United States vessels were allowed under the limitation specified above, to trade with the West Indies, but they were shut out from the East India coasting trade, and United States merchants were not permitted to make East Indian settlements. The United States, "in return for so paltry a favor, opened all the ports she controlled, and surrendered her own commercial advantages in the existing war with scarce a qualification." (1 Schouler's Hist. U. S., 292.)

As to action of Congress on this treaty, see *supra*, §§ 131 *ff.*

Objectionable, however, as was the treaty, its ratification, if the alternative was war with England, may have been the more prudent course. And it must be remembered President Washington may have had fuller information as to the preparation of the country for war than is possessed by us, and more accurate knowledge, also, of the intentions of the British Government. But the perils of rejecting the treaty do not make its terms less overbearing and unfair.

"That Mr. Jay's treaty was a bad one, few persons even then ventured to dispute. No one would venture on its merits to defend it now. There has been no moment since 1810 when the United States would have hesitated to prefer war rather than peace on such terms. No excuse in the temporary advantages gained can wholly palliate the concessions of principle which it yielded, and no considerations of a

possible war with England averted or postponed, can blind history to the fact that this blessing of peace was obtained by the sacrifice of national consistency and by the violation of neutrality toward France. The treaty recognized the right of Great Britain to capture French property in American vessels, whilst British property in the same situation was protected by our previous treaty with France, and, what was worse, the acknowledgment that provisions might be treated as contraband, not only contradicted all our principles, but subjected the United States Government to a charge of a mean connivance in the British effort to famish France, while securing America from pecuniary loss."

Adams' Gallatin, 158. See App., vol. iii, § 150*a*.

On October 24, 1803, Mr. Jefferson submitted to the Senate a convention, signed on May 12, 1803, between Lord Hawkesbury and Mr. King, settling the northeastern and northwestern boundaries. The Senate assented to this, with the understanding that the fifth article, providing for a joint survey of the course and bearings of the Upper Mississippi be thrown out. The British Government did not concur, and in consequence ratifications were not exchanged. This convention, with the correspondence preliminary thereto, is given in 2 Am. St. Pap. (For. Rel.), 382, 584 *ff*.

As to this convention, see discussion by Mr. Monroe, minister to England, in dispatch of June 3, 1804. 3 Am. St. Pap. (For. Rel.), 93.

(*c*) MONROE-PINKNEY AND COGNATE NEGOTIATIONS.

§ 150*b*.

Many of the informal confidential documents connected with the negotiations in London in 1806 are among the Monroe Papers deposited in the Department of State. These papers show that Mr. Fox, who took the head of the department of foreign affairs on the accession, after Mr. Pitt's death, of the Fox-Grenville ministry to power, showed a conciliatory disposition towards, and a great desire to effect a permanent peace with, the United States. He stated at the outset that he was embarrassed by the recent adoption by Congress of the importation act. Mr. Monroe replied that this bill had passed while Mr. Pitt was in power, and when measures antagonistic to the United States were passed with increasing rigor, but that he had no doubt that, if a more liberal course was adopted in England, Congress would recede from its position of retaliation. Before, however, negotiations had materially advanced, Mr. Fox's illness increased so far as to make his withdrawal from active business essential; and with this withdrawal departed the hopes of Mr. Monroe and of Mr. Pinkney of that bold conciliatory action by the ministry which required the aid of Mr. Fox's genius and generosity to secure its adoption. Upon Mr. Fox's illness, the negotiation on the British side was placed in the hands of Lord Auckland, whose prior associations involved him in Mr. Pitt's policy, and Lord Howick, afterwards Earl Grey, who seems to have left the lead in the correspondence to Lord Auckland. The position taken in their conferences by the American envoys was that impressment, being the exercise of a merely municipal power, could not be enforced extraterritorially. Lord Auckland, on the other hand, falling back on the doctrine of indissoluble allegiance, urged that the King had the right at any time and in any place to call on the services of his subjects to aid him in war; and that neutral

merchant ships were not to be regarded as neutral territory to such an extent as to preclude their visitation and search by British officers in quest of British subjects. Backed in this position by the Crown law officers, the British commissioners declared that they could not assent to a solemn surrender of this right, but that they would be willing to discuss any compromise by which the matter could be adjusted satisfactorily to both nations. Mr. Monroe suggested that the Government of the United States, as an equivalent, should undertake to return to British ships all sailors who had deserted from such ships. The counter project of the British commissioners was that statutes should be adopted in the United States making it penal for United States officers to give certificates of citizenship to British subjects, and in Great Britain making it penal for British officers to impress citizens of the United States. The objection to this by the American envoys, an objection they held to be insuperable, was that it prejudiced more or less seriously the right of expatriation. The British commissioners then said that while not prepared explicitly to surrender the right of impressment, reserving the question for future discussion, yet that there should be an understanding between the Governments that this prerogative should only be exercised on the most extraordinary contingencies; that instructions should be given to British commanders to act with the extremest caution even when such emergencies should occur; and that prompt re-dress should be given if any abuse of the prerogative should be shown. Mr. Monroe and Mr. Pinkney being, by this suggestion, left in a position of either disobeying their instructions or of giving up all hopes of a treaty, determined to accept the treaty with this modification, though with a hesitancy and distrust which is abundantly evidenced by the private correspondence among Mr. Monroe's papers. The final reason on their part was that if they erred in thus accepting the treaty, the error could be readily corrected at Washington; if they erred in rejecting the treaty and left London, the error was irremediable. They stated, therefore, to the British commissioners that if they accepted the proposed compromise it was on their own reponsibility, the question being reserved for revision at Washington. The British commissioners on their part conceded to American vessels the right, denied to them by recent rulings in the admiralty court, of carrying European goods, not contraband of war, to any belligerent colony not blockaded by British ships, provided such goods were American property, and had previously been landed in the United States, paying a duty of at least one per cent. above what was refunded on re-exportation. The produce of such colonies also, by the same proposal, might, if not contraband of war, be brought into the United States, and, if it had paid a duty of two per cent. above drawback, be exported to European belligerent non-blockaded ports.

When the treaty arrived at Washington Mr. Jefferson was for a time in doubt as to he position to take. He had been vehemently attacked for his peace tendencies.* His associations, either personal or political,

* "I have been for a long time," said Mr. Quincy, then the leading representative of New England federalism, in a speech on January 19, 1809, "a close observer of what has been done and said by the majority of this House, and, for one, I am satisfied that no insult, however gross, offered to us by either France or Great Britain, could force this majority into a declaration of war. To use a strong but common expression, it could not be kicked into such declaration by either nation." Quincy's Speeches, 143. See, further, as to Mr. Monroe's position, and as to the negotiations at the same time in Washington, *supra*, § 107.

had not been with the shipping interests, and for this very reason he felt himself peculiarly distrustful of any measures which might sanction a claim so odious to those interests as was that of impressment. Before he received information that the American envoys had agreed to the treaty, while they were supposed at Washington to be still hesitating as to its acceptance, Mr. Madison wrote to them, both officially and confidentially, not to hazard the concession. The concession was made, and Mr. Madison's private correspondence shows how reluctant both he and Mr. Jefferson were to overrule it. Mr. Jefferson, in his subsequent letters to Mr. Monroe, speaks of his final non-acceptance of the treaty as an act peculiarly painful to himself. No one can study Mr. Monroe's unpublished writings without seeing that the scar remained with him through his whole life, and that the remembrance of his action in 1807 in agreeing to what he believed to be the dropping of impressment by ignoring it, was vivid in his memory when he submitted to the same method of disposing of the question by the commissioners at Ghent in 1814. But there is this distinction: in 1807 impressment was impliedly recognized in the British proposals by the very restrictions placed on it. In 1814 it was dropped out of sight.

The apparent acquiescence in impressment was the controlling reason—aside from the fact that the treaty was in conflict with instructions—in Mr. Jefferson's mind for its rejection. It was said at the time that the treaty was killed by Mr. Madison from his jealousy of Mr. Monroe. The correspondence, unpublished as well as published, of Mr. Jefferson, Mr. Madison, and Mr. Monroe gives no trace of such jealousy. Mr. Madison's letters show throughout the greatest anxiety that Mr. Monroe's mission should succeed. Mr. Jefferson, in withholding the treaty from the Senate, followed, as the papers show, his own counsels, and it is impossible, on reading the correspondence, not to see that, so far from desiring to injure Mr. Monroe being one of his motives, his peculiar affection for Mr. Monroe was one of the chief grounds for his hesitancy.

Mr. Jefferson, in his annual message in October, 1807, gave the following reasons for non-acceptance of the treaty: "Some of the articles might have been admitted on a principle of compromise, but others were too highly disadvantageous; and no sufficient provision was made against the principal source of the contentions and collisions which were constantly endangering the peace of the two nations."

The body of the correspondence between Messrs. Monroe and Pinkney, ministers to London in 1806, with the British ministry, is, with their instructions, on file in the Department of State. A portion of it, however, was destroyed with other papers at the burning of Washington by the British in 1814. The gap is filled in part from the private papers of Mr. Madison and Mr. Monroe, now deposited in the Department, in part from publications at the time made by the British Government, in part from Congressional publications reprinted in 3 Am. St. Pap. (For. Rel.), 119, 133 *ff*.

In the latter work, pp. 142, 160, is given the exposition of their course by Messrs. Monroe and Pinkney, January 8 and April 22, 25, 1807, with Mr. Madison's replies. As this correspondence relates to questions now finally settled, it is not necessary here to do more than to refer to it by title. Mr. Monroe's letter to the Secretary in vindication of the treaty is given in 3 Am. St. Pap. (For. Rel.), 173. The question is also discussed in 2 Lyman's Diplomacy of the U. S., ch. i; and see *supra*, § 131, as to treaty making power; and *supra*, § 107, as to personal relations of the negotiators.

"Permit me to remark that you are under a mistake in supposing that the treaty concluded by Messrs. Monroe and Pinkney was rejected because it did not provide that free ships should make free goods. It never was required nor expected that such a stipulation should be inserted. As to deserting seamen you will find that Great Britain practices against us the principles we assert against her, and in fact goes further; that we have always been ready to enter into a convention on that subject, founded on reciprocity; and that the documents, long since in print, show that we are willing, on the subject of impressment, to put an end to it, by an arrangement which most certainly would be better for the British navy than that offensive resource, and which might be so managed as to leave both parties at liberty to retain their own ideas of right. Let me add that the acceptance of that would have very little changed the actual situation of things with Great Britain. The orders in council would not have been prevented, but rather placed on stronger ground; the case of the Chesapeake, the same as it is; so also the case of impressments of factitious blockades, etc., all, as at present, pregnant sources of contention and ill humor.

President Madison to Mr. Joy (unofficial), Jan. 17, 1810. 2 Madison's Writings, 467.

In a private letter from Mr. Jefferson (President) to Mr. Monroe, March 29, 1807, Mr. Jefferson, commenting on the conduct of the press in reference to the Monroe-Pinkney treaty (which he withheld from the Senate), speaks of party efforts "to sow tares between you and me, as if I were lending a hand to measures unfriendly to any views which our country might entertain respecting you. But I have not done it (written to you on the subject), because I have before assured you that a sense of duty, as well as of delicacy, would prevent me from ever expressing a sentiment on the subject, and that I think you know me well enough to be assured I shall conscientiously observe the line of conduct I profess. I shall receive you on your return with the warm affection I have ever entertained for you, and be gratified if I can in any way avail the public of your services." In a private letter from Mr. Jefferson to Mr. Monroe, April 11, 1808, Mr. Jefferson's explanation of his course as to the treaty, and as to his relations to Mr. Monroe, are given in greater detail.

MSS. Dept. of State.

Among the Monroe papers in the Department of State is a letter from Mr. Bowdoin, of February 27, 1807, to Mr. Monroe, expressing a general but qualified approval of the treaty just negotiated by Messrs. Monroe and Pinkney.

The subsequent action of the Government of the United States, in respect to Messrs. Erskine and Jackson, is noticed *supra*, §§ 84, 107.

A portion of the correspondence in respect to Mr. Erskine's mission in 1809 to the United States is found in 3 Am. St. Pap. (For. Rel.), 300 *ff.*

As to Jackson's mission, see *supra*, §§ 84, 107.

The correspondence between Mr. Foster, the British minister at Washington, and Mr. Monroe, Secretary of State, beginning with Mr.

Foster's letter of credence, July 2, 1811, and continuing during Mr. Foster's mission, are in 3 Am. St. Pap. (For. Rel.), 435 *ff.*

(*d*) TREATY OF GHENT (1814).

§ 150*c*.

In a letter marked "private," from Mr. Clay to Mr. Monroe, Secretary of State, dated December 25, 1814, are the following passages:

"According to opinions which I have before communicated to you, our negotiation has terminated in a treaty of peace, which was signed yesterday. The terms of this instrument are undoubtedly not such as our country expected at the commencement of the war. Judged of, however, by the actual condition of things, so far as it is known to us, they cannot be pronounced very unfavorable. We lose no territory, I think no honor. If we lose a particular liberty in fisheries, on the one hand (which may be doubted), we gain, on the other, the exemption of the navigation of the Mississippi from British claims. We gain, also, the right of exemption from the British practice of treating with the Indians."

An exposition by Mr. Gallatin of his views prior to assenting to the treaty of Ghent will be found in a letter to Mr. Monroe, dated at Ghent, October 26, 1814, to be found in the Monroe papers, with pencil notes by Mr. Monroe.

Mr. J. Q. Adams's diary of the period of the Ghent negotiations gives a narrative of those negotiations, which, though of deep interest, is affected by his then strong antagonism to Mr. Clay and to Mr. Russell, two of his colleagues.

"You ask me what I think of the correspondence of our ministers at Ghent. I think very well of it. The language, though sometimes heavy, on the whole is at least as good as that of their opponents. Their arguments are better than their language. In argument their superiority is manifest. * * * The British commissioners must be very dull men. Their introduction of Pitt's letter to Stanley, and their reliance on it, constituted a terrible *faux pas*, of which our ministers have properly availed themselves. In the whole correspondence our ministers seem to have been entirely collected and on their guard, and what is equally satisfactory and important, they have firmly maintained the honor and dignity of the country."

Mr. G. W. Hay to Mr. Monroe, Jan. 6, 1815. Monroe MSS., Dept. of State.

"I have no doubt that the British commissioners signed the treaty (if it be signed) under an expectation that Pakenham was in possession of New Orleans, and I am equally confident, from the tenor of the diplomatic correspondence, that New Orleans never would have been restored under the treaty."

Mr. G. W. Hay to Mr. Monroe, Feb. 15, 1815. Monroe MSS., Dept. of State.

As to the negotiation of the treaty the following authorities may be consulted: Adams's Life of Gallatin, 519 *ff.*; Memoirs of John Quincy Adams, containing his diary during the negotiations; 10 John Adams's Works, 97, 106, 129, 131; 3 Am. St. Pap. (For. Rel.), 695 *ff.*; 730 *ff.* (4 ed.), 310; Brit. and For. St. Pap. for 1821–'22, vol. 9, pp. 369, 530, 565, 752, 823.

For correspondence between Mr. Clay and his colleagues in respect to the negotiations at Ghent, see Colton's Correspondence of Clay, 28 *ff.*

English adverse criticisms on the treaty of Ghent are quoted in 2 Ingersoll's Hist. of Late War (1st series), 312, chap. xiii.

A review by Mr. J. Q. Adams of the action of the commissioners at Ghent is given in a report to President Monroe of May 3, 1822. MSS. Report Book.

The convention with Great Britain, under the mediation of Russia, explanatory of the first article of the treaty of Ghent, concerning indemnity for slaves carried from the United States by the British forces in 1812, as submitted to the Senate on Jan. 25, 1823, is in Senate Doc. 354, 2d sess., 17th Cong.; 5 Am. St. Pap. (For. Rel.), 214.

The message of President J. Q. Adams, Mar. 8, 1826, reciting the award of the Emperor of Russia on the questions submitted to him, is contained in House Doc. 421, 19th Cong., 1st sess.; 5 Am. St. Pap. (For. Rel.), 800.

The report of the House Committee on the Judiciary on claims for indemnification under the first article of the treaty of Ghent, is given in House Doc. 478, 20th Cong., 1st sess.; 6 Am. St. Pap. (For. Rel.), 860.

The convention under mediation of Russia, explanatory of the first article of the treaty of Ghent, communicated by President Monroe on January 25, 1823, having been duly ratified, so that the legislation consequent on it could take place, is in House Doc. 354, 17th Cong., 2d sess.; 5 Am. St. Pap. (For. Rel.), 214.

In the London Quarterly Review, vol. 3, p. 286, as noticed in a letter of Mr. Gallatin to Mr. E. Everett, of August 6, 1828 (2 Gallatin's Writings, 400), the treaty of Ghent is spoken of as "That precious treaty, which gave to them (the United States) all that they asked, and much more than they had any right to expect."

The arbitration of the King of the Netherlands, under the fifth article of the treaty of Ghent, is discussed *infra*, § 316.

Under the decision of the commissioners, under the fourth article of the treaty of Ghent, the small island called Pope's Folly, in the bay of Passamaquoddy, is within the jurisdiction of the United States.

An open boat and cargo, Ware, 26.

"On the 1st of June, 1812, President Madison transmitted a confidential message to Congress respecting the relations with Great Britain. It ended without recommending any particular action. It was received in each body with closed doors. In the House it was considered on the 2d and 3d of June with closed doors. On the 3d, Calhoun, from the Committee on Foreign Relations, to whom it had been referred, reported (the House being in secret session) 'that after the experience which the United States have had of the great injustice of the British Government towards them, exemplified by so many acts of violence and oppression, it will be more difficult to justify to the impartial world their patient forbearance, than the measures to which it has become necessary to resort to avenge the wrongs and vindicate the rights and honor of the nation. * * * The period has now arrived when the United States must support their character and station among the nations of the earth. * * * More than seven years have elapsed since the commencement of this system of hostile aggressions by the British Government on the rights and interests of the United States. * * * As early as 1804 the minister of the United States at London was instructed to invite the British Government to enter into a negotiation on all the points on which a collision might arise between the two countries in the course

of the war, and to propose to it an arrangement of their claims on fair and reasonable conditions. The invitation was accepted. * * * It was at this time, and under these circumstances, that an attack was made, by surprise, upon an important branch of the American commerce. * * * The commerce on which this attack was so unexpectedly made was that between the United States and the colonies of France, Spain, and other enemies of Great Britain. * * * In May, 1806, the whole coast of the continent, from the Elbe to Brest, inclusive, was declared to be in a state of blockade. By this act the well-established principles of the law of nations—principles which have served for ages as guides, and fixed the boundary between the rights of belligerents and neutrals—were violated. * * * The next act of the British Government which claims our attention is the order of council of January 7, 1807, by which neutral powers are prohibited from trading from one port to another of France or her allies, or any other country with which Great Britain might not freely trade. * * * We proceed to bring into view the British order in council of November 11, 1807. * * * By this order all France and her allies, and every other country at war with Great Britain, or with which she was not at war, from which the British flag was excluded, and all the colonies of her enemies, were subjected to the same restrictions as if they were actually blockaded in the most strict and rigorous manner; and all trade in articles, the produce and manufacture of the said countries and colonies, and the vessels engaged in it, were subject to capture and condemnation as lawful prize. * * * The attempt to dismember our Union, and overthrow our excellent Constitution, by a secret mission, the object of which was to foment discontent and excite insurrection against the constituted authorities and laws of the nation, as lately disclosed by the agent employed in it, affords full proof that there is no bound to the hostility of the British Government against the United States. * * * The dates of British and French aggressions are well known to the world. Their origin and progress have been marked by too wide and destructive a waste of the property of our fellow-citizens to have been forgotten. The decree of Berlin of November 21, 1806, was the first aggression of France in the present war. Eighteen months had then elapsed after the attack made by Great Britain on our neutral trade with the colonies of France and her allies, and six months from the date of the proclamation of May, 1806. * * * From this review of the multiplied wrongs of the British Government, since the commencement of the present war, it must be evident to the impartial world that the contest which is now forced on the United States is radically a contest for their sovereignty and independence. * * * Your committee recommend an immediate appeal to arms.'

"The House passed a bill entitled 'An act declaring war between Great Britain and her dependencies, and the United States and their Territories,' and on the 5th of June transmitted it to the Senate with a request that it might be considered confidentially. The Senate amended it and passed it as amended on the 17th of June. On the 18th of June the House informed the Senate that the amendments were concurred in, and on the same day the bill was signed by the President and became a law.

"By the 11th of July the American commissioners had notified the Secretary of State that they were at Ghent. The first conference was held on the 8th of August. The course which the negotiations took may be found detailed in Foreign Relations, folio, vol. 3, pages 695–748,

and vol. 4, pages 808–811. The British commissioners brought forward (1) Impressment; (2) Pacification of the Indians and assignment of a territory to them to be taken from the Territories of the United States, with defined boundaries; (3) Revision of the boundary-line between the United States and Great Britain, including the control of the lakes by Great Britain; The fisheries, which the Americans were not to be permitted to enjoy without an equivalent. The American commissioners brought forward—(5) Definition of a blockade; (6) Claims for indemnity for capture and seizure; (7) Other points, the right to present which were reserved.

"On the 4th of October, the Secretary of State sent his last instructions to the commissioners: 'You are authorized, should you find it impracticable to make an arrangement more comformable to the instructions originally given, to agree to the *status quo ante bellum* as the basis of negotiation. The great and unforeseen change of circumstances particularly the prospect of a more durable state of peace between Great Britain and the continental powers of Europe, and of security to our maritime rights, justify this change of our ultimatum. Our right to the fisheries to the full extent of our territory, as defined by the treaty of 1783 with Great Britain, and those of subsequent date with other powers, and to trade with all other independent nations, are, of course, not to be relinquished; nor is anything to be done which would give a sanction to the British claim of impressment on board our vessels, or to that of blockading without the actual application of an adequate force. With these explanations you are at liberty to make such a treaty as your own judgments shall approve, under existing circumstances, subject only to the usual requisite of ratification here. It is important to the United States to make peace, but it is more important to them to preserve their rights as an independent nation, which will in no event be surrendered.'

"Under these instructions the treaty was concluded on the 24th day of December, 1814.

"John Quincy Adams was appointed minister at London on the 28th of February, 1815. Clay and Gallatin also went there, and negotiations were opened for a commercial convention. The official conferences began on the 18th of May, 1815. Napoleon having meanwhile returned from Elba, the American commissioners endeavored to take advantage of the situation to secure stipulations respecting impressment and a definition of blockades. The discussions were prolonged until after the battle of Waterloo. No such provisions were obtained. * * * Discriminating duties collected on British vessels, after it went into operation, and in violation of its provisions, were refunded under an act of Congress.

"Among the subjects discussed by the commissioners at Ghent was the naval force to be maintained on the lakes. No determination was come to, but soon after the peace a correspondence began which ended by an agreement respecting it made in Washington, which was submitted to the Senate for approval, and, when approved, was proclaimed by the President.

"Some steps were taken in the treaty of Ghent toward adjusting the disputed boundary between the United States and the British possessions.

"The fourth article provided for a commission to determine the sovereignty over the islands in and near Passamaquoddy Bay. The execution of this provision and the correspondence relating to it will be found in volume 4, Foreign Relations, folio, pages 171–173.

"The fifth article provided for a commission to determine and to mark the boundary from the source of the Saint Croix to the river Saint Lawrence [called the Iroquois or Cataraquy] on the 45th parallel. This was the disputed line which Mr. King's treaty aimed to settle in 1803. The treaty of 1783 required it to be run on the highlands which divide the rivers that empty themselves into the river Saint Lawrence from those which fall into the Atlantic Ocean. Great Britain contended that it should be run upon the highlands to the south of the Saint John's; but that line of highlands turned no water into the Saint Lawrence. The United States contended that it should be run on the highlands to the north of that river—that being the only watershed that turned its northern waters into the Saint Lawrence, and its southern waters into the Atlantic, although through the Bay of Fundy. The commission under the treaty of Ghent disagreed in opinion and made separate reports to their Governments. The subject, which afterwards became known, diplomatically, as the northeastern boundary question, was, in 1827, referred to the decision of the King of the Netherlands; but his award was satisfactory to neither party, and was rejected by both. Negotiations were from time to time resumed, but they proved fruitless until the treaty of 1842, when by mutual consent the present line was established. For a complete review of the negotiations, see Mr. Webster's speech in the Senate, April 6 and 7, 1846, and the messages and correspondence there referred to.

"The sixth and seventh articles of the treaty of Ghent provided for a commission to determine and mark the boundary from the 45th parallel on the Saint Lawrence to the northwesternmost point of the Lake of the Woods. This commission was duly appointed, and in 1822 reported its work respecting so much of the boundary as was referred to in the 6th article, viz, from the 45th parallel on the Saint Lawrence to the water communication between Lake Huron and Lake Superior. The line indicated by the seventh article was affected by the provisions of the second article of the convention of 1818. This was also marked; but the line as marked was changed in part by the provisions of the second article of the treaty of 1842."

Mr. J. C. B. Davis, Notes, &c.

(*c*) CONVENTIONS OF 1815, 1818.

§ 150*d*.

The commercial convention signed on July 3, 1815, with "the declaration with which it is the intention of the British Government to accompany the exchange of the ratifications," is given, as submitted by President Madison to the Senate on December 6, 1815, in 4 Am. St. Pap. (For. Rel.), 7. This is accompanied by notes from the American negotiators to the Secretary of State, dated London, May 18, July 3, 1815, giving the details of the negotiation.

President J. Q. Adams's message of December 12, 1827, transmitting conventions with Great Britain for continuing in force the commercial convention of July 3, 1815, the third article of the convention of October 20, 1818, and for the reference to a friendly sovereign of the points of difference as to the northeastern boundary of the United States, is in Senate Ex. Doc. 458, 20th Cong., 1st sess.; 6 Am. St. Pap. (For. Rel.), 639.

As to meaning of "just indemnity" in the 5th article of the convention of 1818, see opinion of Mr. Wirt, 1826, cited, *infra*, § 221.

The first article of the treaty of 1815, providing for mutual freedom and liberty of commerce, cannot be construed to imply an obligation to protect the rights of foreign owners of slaves brought to our shores as seamen.

2 Op., 475, Taney, 1831.
As to fisheries, see *infra*, § 301 *ff*.

"The rights of the United States in the British fisheries were not referred to in the treaty of Ghent, and a controversy speedily arose on the British claim to exclude American fisherman from the inshore fisheries. The diplomatic circumstances which led to the conclusion of that part of the convention of 1818 which relates to the fisheries have been referred to in the introductory note. The correspondence relating to it will be found in the 4th volume of the Folio Foreign Relations, pages 348–407. See also the papers submitted to the Senate with the treaty of 1871, pages 35–50. The subject has been often discussed in Congress. The debate in the Senate in the year 1852 presents a thorough discussion of the merits."

Mr. J. C. B. Davis, Notes, &c. See *infra*, §§ 301 *ff*.

The effect of the treaty of 1818 is to reaffirm the right of the United States to the enjoyment of the North Eastern fisheries, subject to certain renunciations. (*Infra*, §§ 301 *ff*.)

"It was contended by the United States, and denied by Great Britain, that the provision of the first article of the treaty of Ghent required the latter to make restitution or compensation for slaves, who, at the date of the ratification, were in any place that was to be restored to the United States, and who were not delivered up with the territory. The parties being unable to agree, it was provided in the convention of 1818 that this question should be referred to some friendly sovereign or state; and in 1822 it was referred to the decision of the Emperor of Russia, who rendered an award in favor of the United States. A joint commission was then appointed to ascertain the claimants and the amount of their claims under this award. Langdon Cheves was the American commissioner, George Jackson, the British. Their proceedings, which commenced August 25, 1823, were terminated in December, 1825, by 'a most extraordinary refusal of Mr. Jackson to execute the 5th article of the convention. * * * This malformation of the tribunal could only have been remedied by a spirit of mutual concession and accommodation between its component members. Such a spirit has, unfortunately, not been evinced in the course of its proceedings by Mr. Jackson.' The whole question was settled by the two Governments by a convention on the 13th November, 1826, providing for the payment of an agreed sum. (See *infra* § 221.)

"The undetermined boundary-line between the old province of Louisiana and the British American possessions, the provisions concerning which defeated Rufus King's treaty of 1803, presented itself again after the peace of 1814. It was settled, temporarily, in the treaty of 1818, by agreeing that the 49th parallel should be the boundary from the Lake of the Woods to the Rocky Mountains, and that the territory west of the Rocky Mountains should be occupied jointly for the term of ten years. Fort George, on the Columbia River, which had been withheld from the United States, in admitted violation of the provisions of the treaty of Ghent, was only then formally restored to them.

"Negotiations were opened at London in 1823, on the motion of the United States, for settling this boundary, but they came 'to a close * * * without any treaty or other engagement having been concluded.' The British plenipotentiaries proposed 'the 49th parallel to the point where it strikes the northernmost branch of the Columbia and thence down along the middle of the Columbia to the Pacific Ocean.' Rush, on his own motion, refused this, and proposed the 49th parallel to the Pacific. The British plenipotentiaries rejected this and made no new proposal in return."

Mr. J. C. B. Davis, Notes, &c.

"In 1826 negotiations were resumed on the suggestions of the British Government. Canning inquired of Rufus King, then minister at London, whether he was provided with instructions for their resumption. King, who was about leaving London, answered that he had been awaiting special instructions, and transmitted the correspondence to Washington. Clay, then Secretary of State, instructed Gallatin, King's successor, that the President could not consent that the boundary should be south of 49°. Gallatin attempted to conclude a convention on that basis, but the attempt proved fruitless, and the negotiations terminated August 6, 1827, by an indefinite extension of the joint occupation, subject to its termination on twelve months' notice by either party.

"This state of things was ended by the passage of a resolution in Congress, April 27, 1846, authorizing the President, 'at his discretion, to give to the Government of Great Britain the notice required * * * for the abrogation of the convention.'

"On the 15th of the following June a treaty was concluded at Washington, in which it was provided that the 49th parallel should be the boundary, 'to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of said channel and of Fuca Straits, to the Pacific Ocean.' The debates in Congress on these subjects will be found in the Globe and appendix for the 1st sess. 29th Cong. The motives and purposes of the United States in making this settlement are set forth in the confidential document already referred to, submitted to the Senate with the treaty of 1871. They were 'so far to depart from the 49th parallel as to leave the whole of Quadra and Vancouver's Island to England.' What the British ministry intended was stated by Sir Robert Peel in the House of Commons on the 26th of June, 1846. 'That which we proposed is the continuation of the 49th parallel of latitude till it strikes the Straits of Fuca; that that parallel should not be continued as a boundary across Vancouver's Island, thus depriving us of a part of Vancouver's Island, but that the middle of the channel shall be the future boundary, thus leaving us in possession of the whole of Vancouver's Island.' It is difficult to see the difference between these two propositions. Lord Palmerston, however, laid claim to run the boundary through the Rosario Straits, and to embrace within British sovereignty an archipelago of islands, instead of Vancouver's Island only. The question remained open until it was settled by a provision in the treaty of 1871, referring it to the Emperor of Germany to decide whether the Rosario Straits or the Canal de Haro was the channel through the middle of which the line should be run according to the true interpretation of the treaty of 1846. The decision was in favor of the Haro Channel and of the claims of the United States.

"In the year 1827 the commercial convention of 1815, which had been renewed and extended in 1818, was again renewed. The United States struggled for more liberal agreements and for a more liberal interpretation of the existing agreement, but could secure neither.

"Ineffectual efforts were also made on both sides for the conclusion of a treaty for the suppression of the African slave-trade. The constitutional assent of the Senate could not be obtained to a provision authorizing a search of American vessels off the coasts of the United States. No treaty arrangement was come to on this subject until the treaty of 1842, negotiated by Mr. Webster and Lord Ashburton, which has already been referred to in connection with the northeastern and northern boundaries, and in the introductory note in connection with extradition. The United States has also made like ineffectual efforts to secure a treaty for the mutual surrender of fugitive slaves. The debates in Congress on the treaty of 1842 have already been referred to; the correspondence connected with it will be found in House Ex. Doc. 2, 27th Cong., 3d sess.

"In that treaty with Great Britain (of 1815) it was for the first time agreed that no higher or other duties or charges should be imposed in any of the ports of the United States on vessels of another power than those payable in the same ports by vessels of the United States; that the same duties should be paid on the importation into the United States of any articles the growth, produce, or manufacture of a foreign power, whether such importation should be made in vessels of the United States or in vessels of that power, and that in all cases where drawbacks were or might be allowed upon the re-exportation of any goods the growth, produce, or manufacture of either country respectively, the amount of the drawback should be the same, whether the goods should have been imported in American vessels or in vessels of the foreign power. How frequently these principles have since been recognized in treaties of the United States, an examination of the index following these notes will show."

Ibid.

Several reports of Secretaries as to present British armaments on the lakes, in connection with the treaty of 1817 as to such force, are in House Ex. Doc. 163, 26th Cong., 1st sess.

The negotiations prior to the convention signed at London October 20, 1818, as submitted to the Senate December 29, 1818, are in Senate Doc. 306, 2d Cong., 2d sess.; 4 Am. St. Pap. (For. Rel.), 348.

In the Brit. and For. St. Pap. for 1818–'19 (vol. 6, 69 *ff.*) will be found the proceedings of the commissioners by whom the treaty of 1818 was negotiated.

The correspondence in 1822–'23 between the United States and Great Britain as to the territory west of the Rocky Mountains will be found in House Doc. 199, 20th Cong., 1st sess.

President J. Q. Adams's message of May 19, 1828, containing the convention with Great Britain of August 6 and September 29, 1827, ratified April 2, 1828, is in House Doc. 492, 20th Cong., 1st sess.; 6 Am. St. Pap. (For. Rel.), 999.

By article 3 of the convention with Great Britain of 1818 it was agreed that the Oregon Territory should "be free and open to the vessels, citizens, and subjects of the two powers, which convention was continued in force until the convention of 1846. It has been held that

during the period of such joint occupation, the country, as to British subjects therein, was British soil, and subject to the jurisdiction of the King of Great Britain; but, as to the citizens of the United States, it was American soil, and subject to the jurisdiction of the United States; and that a child born in such Territory in 1823 of British subjects, was born in the allegiance of the King of Great Britain, and not in that of the United States.

McKay *v.* Campbell, 2 Sawyer, 118. See as to this case *infra*, §§ 183, 191.

(*f*) ASHBURTON TREATY (1842).

§ 150*e*.

A review and analysis of the correspondence between Mr. Webster and General Cass in reference to the Ashburton treaty, is given in 2 Curtis's Life of Webster, 181 *ff*. The portions of Mr. Webster's letters in this discussion which relate to the right of search and impressment are given *infra*, §§ 327, 331 *ff*.; those relating to the Caroline and McLeod cases, *supra*, §§ 21, 50*a ff*. The correspondence relative to the northeastern boundary is here omitted, as it in the main involves concrete rulings which are not likely to be taken as precedents. The extradition features of the treaty are discussed *infra*, §§ 169 *ff*. The detailed action of the Senate in respect to the treaty does not fall within the range of this work, as it is part of the history of the times and generally accessible as such to students in this country.

Mr. Webster's correspondence on the subject is in 2 Webster's Works, 540, 586; 5 *ibid*, 98; 6 *ibid*, 271, 273, 295, 326, 328. His speech in defense of the treaty is given in full, in 5 Webster's Works, 78 *ff*.

The correspondence with Great Britain in 1836, relative to the northeastern boundary of the United States, is in the Brit. and For. St. Pap. for 1833–'34, vol. 22, 770; 1835–'36, vol. 24, 1166; 836–'37, vol. 25, 901.

"There is a very general feeling of satisfaction at the termination of the boundary dispute with the Americans, and it will be impossible for Palmerston, who is ready to find fault with everything the foreign office does, to carry public opinion with him in attacking this settlement. He showed his disposition in a conversation he had lately with M. de Bacourt (just come over from America), to whom he said that we had made very important concessions. But Charles Buller, who was with me when M. de Bacourt told me this, said he for one would defend Lord Ashburton's treaty, let Palmerston say what he would. He never would quarrel with any tolerable arrangement of such a question as that. I heard yesterday a curious thing relating to this matter. Lemon, of the state paper office, called on me, and told me that about three months ago they were employed by the foreign office in searching for documents relating to the original discussions on the boundary question. There was a great deal of correspondence, much of which was copied for the use of Government. While thus occupied, he recollected that there was an old map of North America, which had been lying neglected and tossed about the office for the last twenty-five years, and he determined to examine this map. He did so, and discovered a faint red line drawn all across certain parts of it, together with several pencil lines drawn in parallels to the red line above and below it. It immediately occurred to him that this was the original map supposed to be lost (for it never

could be found), which was used for marking and settling the boundary question, and he gave notice to the foreign office of what he had discovered. The map was immediately sent for and examined by the Cabinet, who deemed it of such importance that they ordered it to be instantly locked up, and that nobody should have access to it. First, however, they sent for the most eminent and experienced men in this line of business, Arrowsmith and two others, and desired them to examine closely this map and report their opinions, separately and without concert, upon certain questions which were submitted to them. These related principally to the antiquity of the red and pencil lines, and whether the latter had been made before or after the former. They all agreed as to the age of the lines, and they proved that the pencil marks had been made subsequently to the red line. I forget the other particulars, but so much importance was attached to the discovery of this map, which was without doubt the original, that an exact account of its lines and marks was made out for Lord Ashburton, and a messenger dispatched to Portsmouth with orders to lay his hands on the first Government steamer he could find, no matter what her destination or purpose, and to go off to America forthwith. As soon afterward as possible the boundary question was settled, and it is certainly reasonable to suppose that this discovery had an important effect upon the decision."

Greville's Memoirs, Sept. 11, 1842, vol. 1, 2d ser.

To this passage is appended the following note:

"The treaty signed at Washington on August 9, 1842, by Lord Ashburton and Mr. Webster, settled the disputed question of the northeast boundary between Canada and the State of Maine, and terminated some other differences between Great Britain and the United States. It was denounced by Lord Palmerston as 'a capitulation,' but generally accepted and applauded by both nations."

"Palmerston complains that our foreign affairs are all mismanaged from first to last, and that *we give up everything;* universal concession the rule of action, and that there can be no difficulty in settling questions if we yield all that is in dispute. He is particularly dissatisfied with the boundary treaty, in which he says we have been overreached by the Americans; that Lord Ashburton was a very unfit man to send there, having an American bias, besides a want of firmness in his character. He thinks the territorial concessions we have made very objectionable and quite unnecessary, and that we had already *proved* our right to the disputed land; that since the King of Holland's award evidence (which was then wanting) has been adduced which clearly establishes our rights. It is evident that he means to fall foul of this arrangement upon the first suitable occasion."

Greville's Memoirs, Sept. 17, 1842, vol. 1, 2d ser.

"On Sunday morning I called on Lord John Russell, and we had an argument about Lord Ashburton and his treaty, which he abused very roundly, saying all that I had before heard of his writing to his brother against it, but still owning that it was not very injurious. I have a great respect for Lord John, who is very honest and clever, but in this matter he talks great nonsense. Palmerston is much more consistent, and takes a clear and broad view of it. He says, 'We are all in the right, and the Americans all in the wrong. Never give up any-

thing, insist on having the thing settled in your own way, and if they won't consent, let it remain unsettled.' But Lord John merely says you might have got better terms if you had held out for them; that *he thinks* Lord Aberdeen and Mr. Everett would have arranged it here more favorably for us than Lord Ashburton did there; that if Lord Aberdeen had proposed such and such terms to Mr. Everett they would have been agreed to in America, and that Lord Ashburton gave up certain things for which he did not obtain a just equivalent—all of which is mere gratuitous assumption, and may be true or may be false. However, he owned that the public was disposed to be satisfied with the treaty, and he did not deny my assertion that Palmerston had committed a blunder in attacking it with such violence."

Greville's Memoirs, Nov. 27, 1842, vol. 1, 2d ser.

"A great sensation has been made here by the publication of the proceedings in the secret session of the Senate at Washington when the treaty was ratified. This brought out the evidence of Jared Sparks, who told them of Franklin's letter to Vergennes, and of the existence of the map he had marked, with a boundary line corresponding precisely with our claim. People cry out lustily against Webster for having taken us in, but I do not think with much reason. Lord Ashburton told me it was very fortunate that this map and letter did not turn up in the course of his negotiation, for, if they had, there would have been no treaty at all, and eventually a scramble, a scuffle, and probably a war. Nothing, he said, would ever have induced the Americans to accept our line and admit our claim, and, with this evidence in our favor, it would have been impossible for us to have conceded what we did, or anything like it. *He* never would have done so, and the matter must have remained unsettled, and after all, he said, it was a dispute *de lana caprina*, for the whole territory we were wrangling about was worth nothing, so that it is just as well the discovery was not made by us. At the same time, our successive Governments are much to blame in not having ransacked the archives at Paris, for they could certainly have done for a public object what Jared Sparks did for a private one, and a little trouble would have put them in possession of whatever that repository contained."

Greville's Memoirs, Feb. 9, 1843, vol. 1, 2d ser.

"The loose nomenclature adopted in that treaty [that of 1783 between the United States and Great Britain] in the attempt to define the boundaries of the United States and British possessions was the cause of all the subsequent bickerings and angry feeling. The 'northwest angle' of Nova Scotia was referred to, but there was ample room for endless difference of opinion as to what *was* the northwest angle. The 'highlands' which divide certain rivers were mentioned, but no one could decide where they were. In 1833 the arbitration of the King of Holland was sought, and the decision, as usual in foreign arbitrations, went much against England. About two-thirds of the disputed territory were given to the United States; yet England would have considered herself bound by the award had not the United States rejected it. * * * At last, in 1842, Lord Ashburton was requested to go to Washington for the purpose of making a new treaty, and he succeeded in his mission so far as signing a treaty was concerned, but to this hour the people on the Canadian side consider that Lord Ashburton permitted himself to be duped, and that their interests were in consequence

mercilessly sacrificed. There were stories of spurious maps and false boundary lines, and for many years there was a large party in England, as well as in the colonies, in which the deepest anger could be stirred by the mere mention of the 'Ashburton capitulation.' To Mr. Croker, however, the new treaty appeared a reasonable and fair solution of the problem, and he defended it with the zeal which never failed to animate him when he believed that he was right. Seven-twelfths of the territory were given to the United States, and the remaining five-twelfths to Great Britain.

"The story of the map appeared in a score of different shapes at the time, and in itself it was very curious. Before Lord Ashburton arrived at Washington, a map of the whole region in dispute was discovered by Mr. Jared Sparks, at Paris, and upon this map Benjamin Franklin had marked with 'a strong red line' the boundaries of the United States as fixed by the treaty of 1783. This line indicated precisely the boundary originally claimed by Great Britain—running south of the Saint John's River, and between its headwaters and those of the Penobscot and the Kennebec. It gave *all* the "No Man's Land' to Great Britain. 'It is evident,' wrote Mr. Sparks, 'that the line from the Saint Croix to the Canadian highlands, is intended to exclude all the waters running into the Saint John's.' The difference to the colonies was immense; but the American negotiators kept the map under lock and key, and Lord Ashburton was not allowed to see either that or Mr. Jared Sparks's letter. The Americans yielded a little of their claims, and thus got the credit with the public of acting with generosity. Great Britain thought she had made a good bargain by surrendering seventh-twelfths of the territories which she would have obtained had the map been produced. When the facts became known in England it did not tend to increase the public satisfaction with the Ashburton treaty; and as to the feeling stirred up in Canada, readers of Judge Haliburton's Works may still be able to form some faint idea of it, although he dealt with the subject only from the light and humorous point of view. Even now it would be hard to persuade an old provincial that the Ashburton treaty was not one of the most unjust agreements ever entered into between two great powers.

"The British Government, it must be added, caused a search to be instituted at Paris for Franklin's map. Strange to say, *that* map was not found, but another was, on which a thick red line had been traced, giving all the disputed territory to the United States. This was indeed an 'extraordinary coincidence,' and to this day it has never been explained."

Croker Papers, 1841–'42; vol. 2, p. 393.

"I ought to have written to you before, and I suppose it is now too late to do so, but I will answer your question at a venture, although I hope to have the opportunity of talking the matter over with you at Peel's to-morrow.

"1. Your first question is the Dutch award. I answer that it was an honest judgment. It was unfavorable to us, but it proceeded on the principle on which almost all arbitrations are conducted, viz, that of mutual concessions. The territory in dispute was not very unequally divided between us. So far from the decision of the King being fairly attributable to any feelings of resentment in consequence of our political conduct in the Netherlands, the Americans rejected it because he

was so notoriously under our influence, and because he had lost his independence with the loss of Belgium.

"2. You next inquire about Livingston's proposal. Palmerston delayed to notice it for eight or nine months, as far as I can learn, for no particular reason at all. This is the opinion in the office.

"When he did reject it he gave a very bad reason for doing so, when he required the previous assent of Maine. This was the business of the Central Government, and not ours. If we had the Government at Washington committed to the principle, this quarrel with the State of Maine was of no consequence to us, and, indeed, ought rather to have been encouraged.

"But I do not think Palmerston was so very wrong in rejecting Livingston's proposal. There is no doubt that he would have carried his northwest line across the Saint John's until he found the highlands, which, according to his interpretation of the treaty, could only be to the north of the Saint John's. No doubt had he diverged from the due north line he would have found highlands to the south of the Saint John's, but he would have said that these did not fulfill the conditions of the treaty of dividing waters, &c.

"Ashburton was not instructed to renew Livingston's proposal, but on the contrary, to give no encouragement to it if it should be reproduced.

"3. You must know by this time why I expressed myself greatly dissatisfied with the message of the President. The manner in which he treated the subject of the right of search was really scandalous. His mention of the Oregon question was also most uncandid. When he talked of pressing us to enter into negotiation he had in his pocket a most friendly overture from us which he had already answered favorably.

"Ashburton had full instructions upon this subject, and if he had remained long enough in the United States I have no doubt that it would have been settled. But the pressing affairs being brought to a close he was naturally desirous of returning home.

"4. I think we have no strict public right to complain of Webster in the affair of Franklin's map. It was most fortunate that it was not discovered by us before the treaty was concluded, for it might not have been easy for us to proceed with such evidence in our possession. We must have gone to an arbitration before the end of which war would probably have ensued. Convincing as the letter and map must be to any impartial man, they have not convinced the Americans, who still maintain their line of boundary in spite of them.

"Although we cannot complain of Webster so as to vitiate the agreement, it is a piece of concealment and of disingenuousness which must inevitably produce an unfavorable impression against him in all honorable minds.

"It is a strange thing that neither letter nor map are to be found at Paris; at least we have hitherto failed in doing so. But we have found *another map* altogether in favor of the American claim. I will tell you the particulars of this curious affair when we meet to-morrow."

Lord Aberdeen to Mr. Croker, Feb. 25, 1843. Croker Pap., chap. xxii, 1841–'42, vol. 2, 398.

With reference to Mr. Livingston's proposal, above noticed, the following note is appended in the Croker Papers:

"Mr. Livingston was then the Secretary of State in General Jackson's Cabinet. He proposed that a scientific survey of the disputed

territory should be made, and that from the 'highlands,' when found, a line should be drawn straight to the head of the Saint Croix, and that this should be regarded as the northeastern boundary of the United States. This proposition, it was generally admitted, would have given the whole or the greater part of the disputed territory to England. But Lord Palmerston first pigeon-holed it for some months, and then saddled it with conditions which made it impossible for the United States to accept it. This was universally considered a great mistake on the part of England."

"The story of the map is undeniable, and has, I believe, been truly told. I shall have much to say about it when I see you, but it is rather an extensive subject to write about, and in some respects rather a delicate one. Jared Sparks, the American historian, rummaging in the archives of the French foreign office, first found the letter from Franklin to Vergennes referring to the map, which he instantly searched for and found in the midst of copies, maps, and charts at the depot of the office, and, though not doubting that he should find the American case confirmed, to his inexpressible surprise, he found the precise contrary. The map was, it seems, used to persuade Maine to yield, and subsequently to persuade the Senate to ratify, my capitulation. Mr. Rives, the reporter of the committee of the Senate to which the treaty was referred, reports that the committee were unanimously of opinion that the American right was not shaken by this discovery, but nevertheless give their opinion that it would not be safe to go to a new arbitration with such a document against them. The truth is that, *probably*, but for this discovery, there would have been no treaty, and if the secret had been known to me earlier I could not have signed it. '*Ainsi tout est pour le mieux dans le meilleur des mondes possibles.*' The public are very busy with the question whether Webster was bound in honor to damage his own case by telling all. I have put this to the consciences of old diplomatists without getting a satisfactory answer. My own opinion is that in this respect no reproach can fairly be made, but the conduct of both President and Secretary is most extraordinary in the other matters relating to my treaty."

Lord Ashburton to Mr. Croker, Feb. 7, 1843. Croker Pap., chap. xxii, 1841-'42, vol. 2, 400.

In the same volume is another letter from Lord Ashburton to Mr. Croker, dated February 13, 1843, in relation to the treaty. In it he blames Lord Palmerston for not having had the French records searched. He adds that by the usages of diplomacy Mr. Webster was not bound to damage his own case, and he made no "personal pledge of opinion as to the intentions of the parties." The map was only conclusive as to Franklin's intentions, and not as to those of the other negotiators, or as to the meaning of the words of the treaty of 1783. Their intentions as to the Saint Croix have no weight against the subsequent determination, by treaty, what is the true Saint Croix and what is its head.

"Do nothing and say nothing at present about the treaty. So far as any Paris map is concerned, we are in the crisis of inquiry, and the *present* state of it is extraordinary.

"Canning was at Paris in 1826; made search for documents relating to the boundary and treaty of 1783; could find nothing.

"Bulwer can find no trace of a letter from Franklin; no trace of the map mentioned by Jared Sparks. But, strange to say, he does find a map, of which he sent us the tracing, a map apparently deposited many years since, which follows exactly with a crimson line the boundary claimed by the United States.

"Jared Sparks cannot have lied so enormously as this discovery would imply.

"Notwithstanding the failure to find it, there must, I think, be a letter from Franklin and a map just as Sparks describes. I tell you all I know at present. Bulwer is a very clever fellow, with great experience in such matters as that which he has been investigating. He writes two letters; one after a short interval; and in the second as well as the first says he cannot confirm the alleged discoveries of Jared Sparks."

Sir Robert Peel to Mr. Croker, Feb. 23, 1843. Croker Pap., chap. xxii, 1841–'42, vol. 2, 402.

"Pending the negotiation of the treaty of Washington, in the spring and summer of 1842, Mr. Webster was made acquainted with the existence at Paris of a copy of D'Anville's map of America on a small scale, on which the boundary between the British Provinces and the United States was indicated by a red line, in a manner favorable to the British claim. This map (which was soon extensively known as the *red line* map) had been discovered by President Sparks in the foreign office at Paris. He also found a letter from Dr. Franklin to the Count de Vergennes, from which it appeared that the boundary had been delineated by Dr. Franklin upon some map at the request of the count and for his information. There was no proof, however, that this letter referred to the map discovered by Mr. Sparks.

"After the negotiation of the treaty and the publication of the debates in the Senate on the question of its ratification, much importance was attached by the opposition press in England to this map, as proving incontestably the soundness of the British claims relative to boundary. It was also absurdly made a matter of reproach against Mr. Webster that he had not as soon as he became acquainted with the existence of this map communicated it to Lord Ashburton.

"So conclusive was this piece of evidence deemed in England in favor of the British claim, and so much importance was attached to it in the debates in Parliament, that it became necessary for Sir Robert Peel by way of offset to refer to another map not before publicly known to exist, namely, a copy of Mitchell's map, which had been used by Mr. Oswald, the British commissioner for negotiating the provisional treaty, and by him sent home to his Government. This map had been preserved in the library of George the Third, and with that library was sent to the British Museum. On this map the line as claimed by the United States is boldly and distinctly traced throughout its whole extent, and the words 'boundary as described by Mr. Oswald,' written in four places with great plainness. It was asserted by Lord Brougham in the House of Peers that these words are in the handwriting of George the Third.

"The writer of this note was assured by Lord Aberdeen that he had no knowledge of the existence of this map till after the conclusion of the Treaty of Washington. He was also assured by Lord Ashburton that he was equally ignorant of it till after his return from America. It

is supposed to have been accidentally discovered in the British Museum, and, under Lord Melbourne's administration, to have been placed in the hands of Mr. Featherstonhaugh with other documents and materials relative to the boundary, although no allusion to this map is made in his report. He was directed by Lord Aberdeen to hand over to Lord Ashburton all the documents and maps in his possession, but this, by far the most important of them all, was not among those transferred by him.

"At about the same time a copy of Mitchell's map was found among the papers of Mr. Jay, one of the American commissioners for negotiating the treaty of 1783. It contains a line drawn from the mouth to the source of the Saint John's, which is described upon the map as 'Mr. Oswald's line.' It no doubt represents the boundary line as offered by Mr. Oswald on the 8th of October, 1782, but not agreed to by the British Government.

"On the discovery of Mr. Jay's map, a meeting of the New York Historical Society was held, at which a very learned memoir on the Northeastern Boundary was read by the venerable Mr. Gallatin, who had acted as one of the commissioners for preparing the American statement to be submitted to the King of the Netherlands as arbiter, and whose knowledge of the subject was not surpassed, if equaled, by that of any other person.

"At the time this meeting was held, the knowledge of Oswald's map had not reached America. The simultaneous discovery of these two maps in England and the United States, the most important in their bearing on the controversy of all the maps produced in the discussion—one of them, in fact (Oswald's), decisive as to the point at issue, a discovery not made till after the conclusion of the treaty of 1842—is among the most singular incidents in the history of the protracted negotiations which resulted in that treaty. Taken together, and in connection with the official correspondence, they leave no doubt that Mr. Jay's map exhibits the proposed line of the 8th of October, 1782, and that Oswald's map exhibits the line of treaty of 1783, and which is that always contended for by the United States.

"Mr. Webster, happening to be in New York, was present by invitation at the meeting of the Historical Society above alluded to, and after the reading of Mr. Gallatin's memoir, having been called upon by its vice-president, Mr. W. Beach Lawrence, made the following speech."

Mr. Everett's introductory note to Mr. Webster's speech on the northeastern boundary, 2 Webster's Works, 143. See discussion in 71 London Quart. Rev., 582.

"The conflict of these maps is undoubtedly a pretty remarkable circumstance. The great mass of contemporaneous maps are favorable to the claims of the United States, and the remarks read by the president of the society are most cogent to evince this. The treaty negotiated in Paris by Mr. Oswald, on the part of the British Government, met with great opposition in Parliament. It was opposed on the very ground that it made a line of boundary 'exceedingly inconvenient to Great Britain'; or, as a leading member of Parliament said, that it made the United States masters both of Nova Scotia and New Brunswick; and maps were published exhibiting this line exactly as claimed by the United States. These maps accompanied the parliamentary papers and debates. Now, it is very extraordinary, it would be deemed almost in

credible, that, if these maps, thus making out a case on which so much stress had been laid against the British ministry and their negotiation, had been erroneous, nobody in the foreign office, nor the minister, nor Mr. Oswald himself, should have one word to suggest against the accuracy of these maps. They defended the treaty and boundary as presented on the maps, not going on the ground at all that those maps exhibited any erroneous presentation. * * *

"Every office in Washington was ransacked, every book of authority consulted, the whole history of all the negotiations, from the treaty of Paris downward, was produced, and among the rest this discovery in Paris, to go for what it was worth. If these afforded any evidences to their (the commissioners of Maine and Massachusetts) minds to produce a conviction that it might be used to obscure their rights, to lead an arbitration into an erroneous, unjust compromise, that was all for their consideration. The map was submitted as evidence, together with all the other proofs and documents in the case, without the slightest reservation on the part of the Government of the United States. I must confess that I did not think it a very urgent duty on my part to go to Lord Ashburton and tell him that I had found a bit of doubtful evidence in Paris, out of which he might perhaps make something to the prejudice of our claims, and from which he could set up higher claims for himself, or throw further uncertainty over the whole matter."

Webster's speech on the northeastern boundary, 2 Webster's Works, 149, 153. On the "red line" question, see further 2 Benton's Thirty Years, 421.

"In this state of things, he (Mr. Webster) made the only use of it (Sparks' copy) which could be legitimately made, in communicating it to the commissioners of the State of Maine and of Massachusetts and to the Senate of the United States, as a piece of conflicting evidence entitled to consideration, likely to be urged as of great importance, as it was derived from a source open to the other party, if the discussion should be renewed, increasing the difficulties which already surrounded the question, and thus furnishing new grounds for agreeing to the proposed conventional line. * * * This would seem to be going as far as reason and honor required, in reference to an unauthenticated document, having none of the properties of legal evidence, not exhibited by the opposite party, *though drawn from a source equally open to them*, and of a nature to be outweighed by contradictory evidence of the same kind, which was very soon done."

Mr. Everett's address on Mr. Webster, Sept. 17, 1859, 4 Everett's Orations, 213. In this address the "red line" question is elaborately discussed.

"It is a remarkable fact that, on each side of the Atlantic, the treaty was attacked as a settlement productive of injury to the honor and the mutual interests of each country. By Lord Palmerston it was stigmatized as the Ashburton capitulation, whilst Mr. Webster was compelled to deliver a most elaborate defense of the policy of his Government in concluding the convention."

Abdy's Kent (1878), 152. See defense of this treaty in 71 London Quart. Rev., 360, where the history of prior negotiations is given.

(*g*) CLAYTON-BULWER TREATY (1850).

§ 150*f*.

The acquisition of California in May, 1848, by the treaty of Gaudalupe-Hidalgo, and the vast rush of population which followed almost immediately on the development of the gold mines to that portion of the Pacific coast, made the opening of interoceanic communication a matter of paramount importance to the United States. In December, 1846, had been ratified a treaty with New Granada (which in 1862 assumed the name of Colombia) by which a right of transit over the Isthmus of Panama was given to the United States, and the free transit over the Isthmus "from the one to the other sea" guaranteed by both of the contracting powers (*supra*, § 145). Under the shelter of this treaty the Panama Railroad Company, composed of citizens of the United States, and supplied by capital from the United States, was organized in 1850 and put in operation in 1855. In 1849, before, therefore, this company had taken shape, the United States entered into a treaty with Nicaragua for the opening of a ship-canal from Greytown (San Juan) on the Atlantic coast to the Pacific coast, by way of the Lake of Nicaragua. Greytown, however, was then virtually occupied by British settlers, mostly from Jamaica (*infra*, § 295), and the whole eastern coast of Nicaragua, so far at least as the eastern terminus of such a canal was concerned, was held, so it was maintained by Great Britain, by the Mosquito Indians, over whom Great Britain claimed to exercise a protectorate. That the Mosquito Indians had no such settled territorial site; that if they had, Great Britain had no such protectorate or sovereignty over them as authorized her to exercise dominion over their soil, even if they had any, are positions which, as will be hereafter seen (*infra*, § 295), the United States has repeatedly affirmed. But the fact that the pretension was set up by Great Britain, and that though it were baseless, any attempt to force a canal through the Mosquito country might precipitate a war, induced Mr. Clayton, Secretary of State in the administration of General Taylor, to ask through Sir H. L. Bulwer, British minister at Washington, the administration of Lord John Russell, (Lord Palmerston being then foreign secretary,) to withdraw the British pretensions to the coast so as to permit the construction of the canal under the joint auspices of the United States and of Nicaragua. This the British Government declined to do, but agreed to enter into a treaty for a joint protectorate over the proposed canal. Of this treaty (Clayton-Bulwer) the following is a summary:

The preamble states that the contracting parties "being desirous of consolidating the relations of amity which so happily subsist between them by setting forth and fixing in a convention their views and intentions with reference to any means of communication by ship-canal which may be constructed between the Atlantic and Pacific Oceans *by way of the river San Juan de Nicaragua, and either or both of the lakes of Nicaragua or Managua to any port or place on the Pacific Ocean.*"

The treaty proceeds as follows:

"ARTICLE I. The Governments of the United States and of Great Britain, hereby declare that neither the one nor the other will ever obtain or maintain for itself *any exclusive control over the said ship-canal;* agreeing that neither will ever erect or maintain any fortifications *commanding the same, or in the vicinity thereof,* or occupy, or fortify, or colonize, *or assume or exercise any dominion over Nicaragua, Costa Rica, the*

Mosquito coast, or any part of Central America; nor will either make use of any protection which either affords, or may afford, or any alliance which either has or may have to or with any state or people, for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or of assuming or exercising dominion over the same; nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection, or influence, that either may possess, with any State or Government *through whose territory the said canal may pass*, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one, any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other."

Article II provides that in case of war between the contracting parties vessels of either traversing the canal shall be exempt from blockade, detention, or capture by the other.

By Article III it is provided that, "in order to secure the construction of the said canal, the contracting parties engage that, if any such canal shall be undertaken upon fair and equitable terms by any parties having the authority of the local Government or Governments through whose territory the same may pass, then the persons employed in making the said canal, and their property used or to be used for that object, shall be protected, from the commencement of the said canal to its completion, by the Governments of the United States and Great Britain, from unjust detention, confiscation, seizure, or any violence whatsoever.

By Article IV it is provided that "the contracting parties will use whatever influence they respectively exercise with any state, states, or Governments possessing, or claiming to possess, any jurisdiction or right over the territory which the said canal shall traverse, or which shall be near the waters applicable thereto in order to induce such states or Governments to facilitate the construction of the said canal by every means in their power; and, furthermore, the United States and Great Britain agree to use their good offices, wherever or however it may be most expedient, in order to procure the establishment of two free ports, one at each end of the said canal."

The remaining articles are as follows:

"ART. V. The contracting parties further engage that when the said canal shall have been completed they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may forever be open and free, and the capital invested therein secure. Nevertheless, the Governments of the United States and Great Britain, in according their protection to the construction of the said canal, and guaranteeing its neutrality and security when completed, always understand that this protection and guarantee are granted conditionally, and may be withdrawn by both Governments, or either Government, if both Governments or either Government should deem that the persons or company undertaking or managing the same adopt or establish such regulations concerning the traffic thereupon as are contrary to the spirit and intention of this convention, either by making unfair discriminations in favor of the commerce of one of the contracting parties over the commerce of the other, or by imposing oppressive exactions or unreasonable tolls upon passengers, vessels, goods, wares, merchandise, or other articles. Neither party, however, shall withdraw the aforesaid protection and guarantee without first giving six months' notice to the other.

"ART. VI. The contracting parties in this convention engage to invite every state with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other states may share in the honor and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated. And the contracting parties likewise agree that each shall enter into treaty stipulations with such of the Central American States as they may deem advisable for the purpose of more effectually carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans, for the benefit of mankind, on equal terms to all, and of protecting the same; and they also agree that the good offices of either shall be employed, when requested by the other, in aiding and assisting the negotiation of such treaty stipulations; and should any differences arise as to right or property over the territory through which the said canal shall pass, between the States or Governments of Central America, and such differences should in any way impede or obstruct the execution of the said canal, the Governments of the United States and Great Britain will use their good offices to settle such differences in the manner best suited to promote the interests of the said canal, and to strengthen the bonds of friendship and alliance which exist between the contracting parties.

"ART. VII. It being desirable that no time should be unnecessarily lost in commencing and constructing the said canal, the Governments of the United States and Great Britain determine to give their support and encouragement to such persons or company as may first offer to commence the same, with the necessary capital, the consent of the local authorities, and on such principles as accord with the spirit and intention of this convention; and if any persons or company should already have, with any state through which the proposed ship-canal may pass, a contract for the construction of such a canal as that specified in this convention, to the stipulations of which contract neither of the contracting parties in this convention have any just cause to object, and the said persons or company shall, moreover, have made preparations and expended time, money, and trouble on the faith of such contract, it is hereby agreed that such persons or company shall have a priority of claim over every other person, persons, or company to the protection of the Governments of the United States and Great Britain, and be allowed a year from the date of the exchange of the ratifications of this convention for concluding their arrangements and presenting evidence of sufficient capital subscribed to accomplish the contemplated undertaking; it being understood that if, at the expiration of the aforesaid period, such persons or company be not able to commence and carry out the proposed enterprise, then the Governments of the United States and Great Britain shall be free to afford their protection to any other persons or company that shall be prepared to commence and proceed with the construction of the canal in question.

"ART. VIII. The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and

especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

At the time of the execution of this treaty the British Government claimed dominion over the (1) Bay Islands, including the island of Ruatan, and other islands on the ocean adjoining Honduras; (2) the Mosquito coast; and (3) the Belize, or British Honduras. This dominion the British Government continued after the execution of the treaty to exercise in defiance of the renunciation contained in the first article of the treaty as above given. An attempt was made to remove the collision which was thus provoked by a new treaty (Clarendon-Dallas), which, however, failed from the non-acceptance by Great Britain of the amendments introduced into the treaty by the Senate of the United States. Great Britain, on her side, undertook to at least lessen the cause of offense by negotiating, in November, 1859, a treaty with Honduras, in which she stipulated to surrender to that Republic her claim to Ruatan and the Bay Islands; and in the same year she executed a treaty with Guatemala for the defining the boundaries of British Honduras, or the Belize, as it is more properly to be called. In January, 1860, she entered into a treaty with Nicaragua by which she with some qualifications withdrew from the protectorate over the Mosquito country. These treaties having been, in 1860, communicated officially to President Buchanan, he stated, as will be seen in his last annual message (Dec., 1860), that "the discordant constructions of the Clayton-Bulwer treaty between the two Governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this Government." (See *supra*, § 145). But this statement of President Buchanan, as will be seen at the close of this section, is based on the assumption that Great Britain had withdrawn not merely from the technical but from the actual protectorate of the Mosquito country, and had absolutely ceased, as the first article of the Clayton-Bulwer treaty requires, to "take advantage of any intimacy, or use any alliance, connection, or influence" she "might possess with any state or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly," for her subjects, "any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the" citizens of the United States. Whether Great Britain retains, indirectly or directly, her influence over the Mosquito territory, and whether she continues to use her "influence" in Central America in a manner prohibited by the treaty, are questions of fact for subsequent discussion. (See remarks at close of this section, and also *infra*, §§ 287 *ff*.)

The following documents explain the position of the executive department of the Government as to the questions which, under the above circumstances, arose on the construction of the treaty.

"In my previous dispatch of this day I have informed your lordship of my having concluded a treaty with Mr. Clayton respecting the construction of a ship communication between the two oceans of the Atlantic and Pacific, and I have there stated to your lordship that there are some slight differences between the original project transmitted home on the 3d of February and the treaty now concluded.

"I have thought it better to explain the nature of these changes, and my reasons for adopting them, in a separate dispatch; and I shall do so, rather according to the manner and time in which they were made than according to the place in the convention in which they occur.

"The first, therefore, I shall refer to is in Article VI, to which are added the words:

"'And should any differences arise as to right or property over the territory through which the said canal shall pass between the States or Governments of Central America, and such differences should in any way impede or obstruct the execution of the said canal, the Governments of Great Britain and the United States will use their good offices to settle such differences in the manner best suited to promote the interests of the said canal, and to strengthen the bonds of friendship and alliance which exist between the contracting parties.'

"This addition, in reconsidering the matter, was deemed, both by myself and Mr. Clayton an advantage to the treaty, and a sort of guarantee against future unfriendly disputes between the two Governments as to the subject referred to.

"The second addition agreed to is in Article VII, to which has been added:

"'And if any persons or company should already have, with any State through which the proposed ship-canal may pass, a contract for the construction of such a canal as that specified in the convention, to the stipulations of which contract neither of the contracting parties in this convention have any just cause to object, and the said persons or company shall, moreover, have made preparations and expended time, money, and trouble on the faith of such contract, it is hereby agreed that such persons or company shall have a priority of claim over every other person, persons, or company, to the protection of the Governments of Great Britain and the United States, and be allowed a year from the date of the exchange of the ratifications of this convention for concluding their arrangements, and presenting evidence of sufficient capital subscribed to accomplish the contemplated undertaking, it being understood that if, at the expiration of the aforesaid period, such persons or company be not able to commence and carry out the proposed enterprise, then the Governments of Great Britain and the United States shall be free to afford their protection to any other persons or company that shall be prepared to commence and proceed with the construction of the canal in question.'

"I should here state to your lordship that when the treaty was placed under the notice of the chairman of the Committee on Foreign Relations in the Senate, a gentleman of great weight, and of the more importance since he belongs to the dominant party in the chamber of which he is a member, he considered that it would only be fair that the two Governments should give an open and avowed preference by name to an American company which had first conceived and taken steps to carry out the proposed undertaking. This I objected to; but I deemed there could be no objection to giving to any company, under certain fair conditions, such as are specified, the preference that was sought, although those

conditions applied to a company that was American. In this manner a sort of compromise was effected.

"The third alteration adopted is in Article VIII, the whole of which article is remodeled.

"This alteration, I must say, was the effect of the joint opinion of Mr. Clayton and myself, both thinking that the article as amended, was better and more clear, referring especially to two lines of communication which seem the most likely to be adopted, and securing thereby a considerable support to the convention in general, many persons being interested in the Panama and Tehauntepec projects.

"The only other change which it is worth while remarking upon occurs first in the body of the treaty, but was the last mooted or adopted. Your lordship will perceive it by casting your eye over Article I, in which a passage is inserted between the words 'Central America,' which close the second line in the page, down to, 'nor will Great Britain or the United States take advantage of any,' &c., which occurs in the third line from the bottom of the said page, some few words having been left out to admit of the aforesaid passage. The manner in which this change was effected was as follows:

"It struck me that the declaration or note mentioned by your lordship bound our Government as to its protection over the Mosquitoes, but did not bind the United States Government as to its protection over such other States, even Nicaragua, as it might hereafter form an especial alliance with. Moreover, the pledge that we would not do covertly what we had declared we would not do directly seemed to me a pledge that it would be more suitable and becoming that both parties should take than that one alone should take.

"With these views, instead of presenting the note, I embodied in the treaty the substance of the declaration given by your lordship to Mr. Lawrence, constituting that declaration so as to apply to any Government or people we do or may protect, and also to any Government or people that the United States Government do or may protect. Some discussion took place on this matter, but finally it was so arranged.

"As the case now stands it is clearly understood that Her Majesty's Government holds by its own opinions already expressed as to Mosquito, and that the United States does not depart from its opinion also already expressed as to the same subject; but the main question of the canal being settled on an amicable basis, and the future relations of the United States and Great Britain being regulated in all other parts of Central America, the discussion of this difference, which has lost its great practical importance, is avoided in an arrangement meant to be as much as possible of a perfectly friendly character.

"I need not say that should your lordship wish to make any further statement as to the views of Her Majesty's Government with respect to the protectorate of Mosquito, that statement can still be made; nothing in the present convention is affirmed thereupon, but nothing is abandoned.

"I trust that after this statement your lordship will approve of the course I have pursued.

"There are various small and verbal differences between the original project and treaty which I have not enumerated, because they leave the general sense the same, and have only been adopted to express that sense more clearly. The word 'fortify' is inserted between 'occupy and colonize' in the second line from the bottom of the page in Article I, but this word had been used in your lordship's note to Mr. Lawrence, and

only imposes in that place an obligation which had already been agreed to and stated elsewhere. The word 'blockade' is inserted before the words 'detention or capture' in Article II, at the request of several influential persons, but only signifies what detention and capture had already expressed."

Sir H. L. Bulwer to Lord Palmerston, Apr. 28, 1850.

Declaration made by Sir Henry Bulwer at the Department of State, June 29, 1850, prior to the exchange of the ratifications of the Clayton-Bulwer treaty.

"In proceeding to the exchange of the ratifications of the convention, signed at Washington on the 19th of April, 1850, between Her Britannic Majesty and the United States of America, relative to the establishment of a communication by ship-canal between the Atlantic and Pacific Oceans:

"The undersigned, Her Britannic Majesty's plenipotentiary, has received Her Majesty's instructions to declare that Her Majesty does not understand the engagements of that convention to apply to Her Majesty's settlement at Honduras, or to its dependencies.

"Her Majesty's ratification of the said convention is exchanged under the explicit declaration above mentioned.

"Done at Washington, the 29th day of June, 1850.

"H. L. BULWER."

Memorandum touching Sir Henry Bulwer's declaration filed by Mr. Clayton in the Department of State at Washington, July 5, 1850.

"The within declaration of Sir H. L. Bulwer was received by me on the 29th day of June, 1850. In reply I wrote him my note of the 4th of July, acknowledging that I understood British Honduras was not embraced in the treaty of the 19th day of April last, but at the same time carefully declining to affirm or deny the British title in their settlement or its alleged dependencies. After signing my note last night I delivered it to Sir Henry, and we immediately proceeded, without any further or other action, to exchange the ratifications of said treaty. The blank in the declaration was never filled up. The consent of the Senate to the declaration was not required, and the treaty was ratified as it stood when it was made.

"JOHN M. CLAYTON.

"N. B.—The rights of no Central American State have been compromised by the treaty or by any part of the negotiations."

"I believe Great Britain has never defined the character of her claim to possess what is called 'the Colony of the Bay Islands.' It does not appear to be one of her organized colonies. She has not, in explicit language, claimed sovereignty over it, though her acts have indicated such a purpose. Whatever may have been her rights or pretension to rights over this colony, they were all given up, according to the view here taken of the subject, by the Clayton and Bulwer treaty. * * *

"It is presumed that the only part of that colony to which England will be disposed to attach much value, or have any inducement to retain, is the island of Ruatan. From an intimation made to me it may

be that she will take the position that this island does not belong to any of the Central American States, but is to be regarded in the same condition as one of the West India Islands. By reference to the treaties between Great Britain and Spain, you will find this island clearly recognized as a Spanish possession and a part of the old viceroyalty of Guatemala."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Sept. 12, 1853. MSS. Inst., Gr. Brit.

"In relation to the Clayton and Bulwer treaty, about which so much is said in your dispatches, I have only to remark that this Government considers it a subsisting contract, and feels bound to observe its stipulations so far as by fair construction they impose obligations upon it.

"If Great Britain has failed, or shall fail, on her part to fulfill the obligations she has therein assumed, or if she attempts to evade them by a misconstruction of that instrument, the discussions that may arise on these subjects must necessarily take place between the parties to it. The views taken of that treaty by the United States, and your course in relation to it, pointed out in your first instructions, will be observed until you receive notice of their modification. In these instructions you were furnished with the views of one of the contracting parties (Great Britain), but at the same time you were informed that the United States did not concur in them. In the negotiations at London, in regard to the affairs of Central America, the meaning of that instrument will come directly under discussion. So far as respects your mission, you will regard it as meaning that the American negotiator intended when he entered into it, and what the Senate must have understood it to mean when it was ratified, viz, that by it Great Britain came under engagements to the United States to recede from her asserted protectorate of the Mosquito Indians, and to cease to exercise dominion or control in any part of Central America. If she had any colonial possessions therein at the date of the treaty, she was bound to abandon them, and equally bound to abstain from colonial acquisitions in that region. In your official intercourse with the States of Central America, you will present this construction of the treaty as the one given to it by your Government.

"It is believed that Great Britain has a qualified right over a tract of country called the Belize, from which she is not ousted by this treaty, because no part of that tract, when restricted to its proper limits, is within the boundaries of Central America."

Mr. Marcy, Sec. of State, to Mr. Borland, Dec. 30, 1853. MSS. Inst., Am. St.

Statement of Mr. Buchanan for Lord Clarendon.

"LEGATION OF THE UNITED STATES,
"*London, January* 6, 1854.

"Mr. Monroe, one of our wisest and most discreet Presidents, announced in a public message to Congress in December, 1823, that 'the

American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered subjects for future colonization by any European powers.' This declaration has since been known throughout the world as the 'Monroe doctrine,' and has received the public and official sanction of subsequent Presidents, as well as of a large majority of the American people. Whilst this doctrine will be maintained whenever, in the opinion of Congress, the peace and safety of the United States shall render this necessary, yet to have acted upon it in Central America might have brought us into collision with Great Britain, an event always to be deprecated, and, if possible, avoided. We can do each other the most good and the most harm, of any two nations in the world, and therefore it is our strong mutual interest, as it ought to be our strong mutual desire, to remain the best friends. To settle these dangerous questions, both parties wisely resorted to friendly negotiations, which resulted in the convention of April, 1850. May this prove to be instrumental in finally adjusting all questions of difficulty between the parties in Central America, and in perpetuating their peace and friendship.

"Surely the Mosquito Indians ought not to prove an obstacle to so happy a consummation."

Statement of Lord Clarendon for Mr. Buchanan.

"FOREIGN OFFICE, *May* 2, 1854.

"It was never in the contemplation of Her Majesty's Government, nor in that of the Government of the United States, that the treaty of 1850 should interfere in any way with Her Majesty's settlement at Belize or its dependencies. It was not necessary that this should have been particularly stated, inasmuch as it is generally considered that the term 'Central America'—a term of modern invention—could only appropriately apply to those States at one time united under the name of the 'Central American Republic,' and now existing as five separate Republics; but, in order that there should be no possible misconception at any future period relative to this point, the two negotiators at the time of ratifying the treaty exchanged declarations to the effect that neither of the Governments they represented had meant in such treaty to comprehend the settlement and dependencies in question.

"Mr. Clayton's declaration to Her Majesty's Government on this subject was ample and satisfactory, as the following extract from his note of July 4, 1850, will show:

"'The language of the first article of the convention concluded on the 19th day of April last between the United States and Great Britain, describing the country not to be occupied, &c., by either of the parties, was, as you know, twice approved by the Government, and it was neither understood by them nor by either of us (the negotiators), to include the British settlement in Honduras (commonly called British Honduras, as distinct from the State of Honduras), nor the small islands in the neighborhood of that settlement which may be known as its dependencies.

"'To this settlement and these islands the treaty we negotiated was not intended by either of us to apply. The title to them it is now and has been my intention throughout the whole negotiation to leave as the treaty leaves it, without denying or affirming or in any way meddling with the same, just as it stood previously.

"'The chairman of the Committee on Foreign Relations of the Senate, the Hon. W. R. King, informs me that the Senate perfectly understood that the treaty did not include British Honduras.'

"Such having been the mutual understanding as to the exception of the settlement of Belize and its dependencies from the operation of the treaty, the only question relative to this settlement and its dependencies in reference to the treaty that can now arise is as to what is the settlement of Belize and its dependencies, or, in other words, as to what is British Honduras and its dependencies.

"Her Majesty's Government certainly understood that the settlement of Belize, as here alluded to, is the settlement of Belize as established in 1850, and it is more warranted in this conclusion from the fact that the United States had, in 1847, sent a consul to this settlement, which consul had received his exequatur from the British Government, a circumstance which constitutes a recognition by the United States Government of the settlement of British Honduras under Her Majesty as it then existed.

"Her Majesty's Government at once states this, because it perceives that Mr. Buchanan restricts the said settlement within the boundaries to which it was confined by the treaty of 1786, whilst Her Majesty's Government not only has to repeat that the treaties with old Spain cannot be held, as a matter of course, to be binding with respect to all the various detached portions of the old Spanish-American monarchy, but it has also to observe that the treaty of 1786 was put an end to by a subsequent state of war between Great Britain and Spain; that during that war the boundaries of the British settlement in question were enlarged; and that when peace was re-established between Great Britain and Spain no treaty of a political nature, or relating to territorial limits, revived those treaties between Great Britain and Spain which had previously existed.

"Her Majesty's Government, in stating this fact, declares distinctly, at the same time, that it has no projects of political ambition or aggrandizement with respect to the settlement referred to, and that it will be its object to come to some prompt, fair, and amicable arrangement with the states in the vicinity of British Honduras for regulating the limits which should be given to it, and which shall not henceforth be extended beyond the boundaries now assigned to them."

Remarks by Mr. Buchanan in reply to Lord Clarendon's statement of May 2.

"LEGATION OF THE UNITED STATES,
"*London, July* 22, 1854.

"In regard to Belize proper, confined within its legitimate boundaries, under the treaties of 1783 and 1786, and limited to the usufruct specified in these treaties, it is necessary to say but a few words. The Government of the United States will not, for the present, insist upon the withdrawal of Great Britain from this settlement, provided all the other questions between the two Governments concerning Central America can be amicably adjusted. It has been influenced to pursue this course partly by the declaration of Mr. Clayton, of the 4th of July, 1850, but mainly in consequence of the extension of the license granted by Mexico to Great Britain under the treaty of 1826, which that Republic has yet taken no steps to terminate.

"It is, however, distinctly to be understood that the Government of the United States acknowledge no claim of Great Britain within Belize

except the temporary 'liberty of making use of the wood of the different kinds, the fruits, and other produce in their natural state,' fully recognizing that the former 'Spanish sovereignty over the country' belongs either to Guatemala or to Mexico.

"In conclusion, the Government of the United States most cordially and earnestly unites in the desire expressed by 'Her Majesty's Government, not only to maintain the convention of 1850 intact, but to consolidate and strengthen it by strengthening and consolidating the friendly relations which it was calculated to cement and perpetuate.' Under these mutual feelings it is deeply to be regretted that the two Governments entertain opinions so widely different in regard to its true effect and meaning."

"Whilst it is greatly to the interest, as I am convinced it is the sincere desire, of the Governments and people of the two countries to be on terms of intimate friendship with each other, it has been our misfortune almost always to have had some irritating, if not dangerous, outstanding question with Great Britain.

"Since the origin of the Government we have been employed in negotiating treaties with that power, and afterwards in discussing their true intent and meaning. In this respect, the convention of April 19, 1850, commonly called the Clayton and Bulwer treaty, has been the most unfortunate of all; because the two Governments place directly opposite and contradictory instructions upon its first and most important article. Whilst, in the United States, we believed that this treaty would place both powers upon an exact equality by the stipulation that neither will ever 'occupy, or fortify, or colonize, or assume, or exercise any dominion' over, any part of Central America, it is contended by the British Government that the true construction of this language has left them in the rightful possession of all that portion of Central America which was in their occupancy at the date of the treaty; in fact, that the treaty is a virtual recognition on the part of the United States of the right of Great Britain, either as owner or protector, to the whole extensive coast of Central America, sweeping round from the Rio Hondo to the port and harbor of San Juan de Nicaragua, together with the adjacent Bay Islands, except the comparatively small portion of this between the Sarstoon and Cape Honduras. According to their construction, the treaty does no more than simply prohibit them from extending their possessions in Central America beyond the present limits. It is not too much to assert, that if in the United States the treaty had been considered susceptible of such a construction, it never would have been negotiated under the authority of the President, nor would it have received the approbation of the Senate. The universal conviction in the United States was, that when our Government consented to violate its traditional and time-honored policy, and to stipulate with a foreign Government never to occupy or acquire territory in the Central American portion of our own continent, the consideration for this sacrifice was that Great Britain should,

in this respect at least, be placed in the same position with ourselves. Whilst we have no right to doubt the sincerity of the British Government in their construction of the treaty, it is at the same time my deliberate conviction that this construction is in opposition both to its letter and its spirit.

"Under the late Administration negotiations were instituted between the two Governments for the purpose, if possible, of removing these difficulties; and a treaty having this laudable object in view was signed at London on the 17th October, 1856, and was submitted by the President to the Senate on the following 10th of December. Whether this treaty, either in its original or amended form, would have accomplished the object intended without giving birth to new and embarrassing complications between the two Governments, may perhaps be well questioned. Certain it is, however, it was rendered much less objectionable by the different amendments made to it by the Senate. The treaty, as amended, was ratified by me on the 12th March, 1857, and was transmitted to London for ratification by the British Government. That Government expressed its willingness to concur in all the amendments made by the Senate with the single exception of the clause relating to Ruatan and the other islands in the Bay of Honduras. The article in the original treaty, as submitted to the Senate, after reciting that these islands and their inhabitants 'having been, by a convention bearing date the 27th day of August, 1856, between her Britannic Majesty and the Republic of Honduras, constituted and declared a free territory under the sovereignty of the said Republic of Honduras,' stipulated that 'the two contracting parties do hereby mutually engage to recognize and respect in all future times the independence and rights of the said free territory as a part of the Republic of Honduras.'

"Upon an examination of this convention between Great Britain and Honduras of the 27th August, 1856, it was found that, whilst declaring the Bay Islands to be 'a free territory under the sovereignty of the Republic of Honduras,' it deprived that Republic of rights without which its sovereignty over them could scarcely be said to exist. It divided them from the remainder of Honduras, and gave to their inhabitants a separate Government of their own, with legislative, executive, and judicial officers, elected by themselves. It deprived the Government of Honduras of the taxing power in every form, and exempted the people of the islands from the performance of military duty, except for their own exclusive defense. It also prohibited that Republic from erecting fortifications upon them for their protection—thus leaving them open to invasion from any quarter; and, finally, it provided 'that slavery shall not at any time hereafter be permitted to exist therein.'

"Had Honduras ratified this convention, she would have ratified the establishment of a state substantially independent within her own limits, and a state at all times subject to British influence and control. Moreover, had the United States ratified the treaty with Great Britain

in its original form, we should have been bound 'to recognize and respect in all future time' these stipulations to the prejudice of Honduras. Being in direct opposition to the spirit and meaning of the Clayton and Bulwer treaty as understood in the United States, the Senate rejected the entire clause, and substituted in its stead a simple recognition of the sovereign right of Honduras to these islands in the following language: 'The two contracting parties do hereby mutually engage to recognize and respect the islands of Ruatan, Bonaco, Utila, Barbaretta, Helena, and Morat, situate in the Bay of Honduras, and off the coast of the Republic of Honduras, as under the sovereignty and as part of the said Republic of Honduras.'

"Great Britain rejected this amendment, assigning as the only reason that the ratifications of the convention of the 27th August, 1856, between her and Honduras, had not been 'exchanged, owing to the hesitation of that Government.' Had this been done, it is stated that 'Her Majesty's Government would have had little difficulty in agreeing to the modification proposed by the Senate, which then would have had in effect the same signification as the original wording.' Whether this would have been the effect—whether the mere circumstance of the exchange of the ratifications of the British convention with Honduras prior in point of time to the ratification of our treaty with Great Britain would, 'in effect,' have had 'the same signification as the original wording,' and thus have nullified the amendment of the Senate, may well be doubted. It is, perhaps, fortunate that the question has never arisen.

"The British Government, immediately after rejecting the treaty as amended, proposed to enter into a new treaty with the United States, similar in all respects to the treaty which they had just refused to ratify, if the United States would consent to add to the Senate's clear and unqualified recognition of the sovereignty of Honduras over the Bay Islands the following conditional stipulation: 'Whenever and so soon as the Republic of Honduras shall have concluded and ratified a treaty with Great Britain, by which Great Britain shall have ceded, and the Republic of Honduras shall have accepted, the said islands, subject to the provisions and conditions contained in such treaty.'

This proposition was, of course, rejected. After the Senate had refused to recognize the British convention with Honduras of the 27th August, 1856, with full knowledge of its contents, it was impossible for me, necessarily ignorant of 'the provisions and conditions' which might be contained in a future convention between the same parties, to sanction them in advance.

"The fact is, that when two nations like Great Britain and the United States, mutually desirous as they are, and I trust ever may be, of maintaining the most friendly relations with each other, have unfortunately concluded a treaty which they understand in senses directly opposite, the wisest course is to abrogate such a treaty by mutual consent, and

to commence anew. Had this been done promptly, all difficulties in Central America would most probably ere this have been adjusted to the satisfaction of both parties. The time spent in discussing the meaning of the Clayton and Bulwer treaty would have been devoted to this praiseworthy purpose, and the task would have been the more easily accomplished, because the interest of the two countries in Central America is identical, being confined to securing safe transits over all the routes across the Isthmus."

President Buchanan, First Annual Message, 1857.

"The President has always regretted the differences between the United States and Great Britain, which have grown out of their different constructions of the 'Clayton-Bulwer treaty,' and has been sincerely desirous to see them amicably arranged.

"In proof of this friendly disposition, he gave his sanction to the Dallas-Clarendon treaty of 1856, as amended by the Senate, notwithstanding the objections which your lordship is aware he entertained to some of its provisions. When this treaty had failed in consequence of the refusal of Great Britain to ratify it in its amended form, he was confidentially informed by your lordship, on the 19th of October last, in an interview which you had sought for the purpose, 'that Her Majesty's Government had considered the several alternatives of action which were open to their selection, and, in a review of the whole case, had resolved to dispatch a representative of authority and experience to Central America, charged to make a definite settlement of all the matters with regard to which the United States and England are still at variance.' Your lordship added that Sir William Gore Ouseley had been selected as the representative, and that while you were unable to explain the precise character of his instruction, you 'believed it was the intention of Her Majesty's Government to carry the Clayton-Bulwer treaty into execution according to the general tenor of the interpretation put upon it by the United States, but to do so by separate negotiations with the Central American Republics in lieu of a direct negotiation with the Federal Government.' * * *

"Should Sir William Ouseley's mission be successful in giving effect to the Clayton-Bulwer treaty according to the American construction of it, it will be unnecessary, of course, for either the United States or Great Britain to consider the question of its abrogation; had this abrogation been promptly made as soon as it was discovered that the treaty was understood by the parties to it in senses directly opposite, it is quite possible that the Central American questions might have been adjusted ere this to the satisfaction of both Governments, and if the abrogation could be accomplished now by substituting a new adjustment of these questions for that which has led to so much discussion in the convention of 1850, this might be a fortunate termination of the whole controversy. But after eight years of fruitless negotiation,

to abandon the treaty, without any arrangement whatever of the difficulties out of which it grew, would be almost to abandon at the same time all hope of adjusting these difficulties in a peaceful manner.

"In a recent conversation with your lordship on this subject I understood you to say that while Great Britain might possibly consent to dissolve the treaty, it would, in your belief, expect the dissolution to be accompanied by some stipulations which Her Majesty's Government desire to have, in respect to the transit routes across the isthmus, but that it had no intention in that event of relinquishing any of the possessions which it now has in Central America. With this understanding of your suggestion I replied that, in my judgment, the President would never consent, while Great Britain continued to maintain her Central American possessions, to make new concessions to her interests in that quarter, but would prefer rather that the dissolution of the treaty should be naked and unconditional. From your lordship's 'confidential' note to Lord Malmesbury of the 22d ultimo, I now learn that in advising certain new stipulations to accompany the repeal of the treaty of 1850, should such a repeal be determiued on, you had 'never designed' to represent those suggestions as official or unalterable, or to intimate that Her Majesty's Government would not listen to any amicable proposal for the simple revocation of the treaty alluded to.'

"I understand your lordship, however, to remain firmly of opinion that if the treaty should be dissolved, Her Majesty's Government would relinquish none of its pretensions in Central America, and that the Bay Islands especially 'would remain attached to the British Crown.' Since it is well known that the views of this Government are wholly inconsistent with these pretensions, and that it can never willingly therefore acquiesce in their maintenance by Great Britain, your lordship will readily perceive what serious consequences might follow a dissolution of the treaty if no provision should be made at the same time for adjusting the questions which led to it.

"If, therefore, the President does not hasten to consider now the alternative of repealing the treaty of 1850 it is because he does not wish prematurely to anticipate the failure of Sir William Ouseley's mission, and is disposed to give a new proof to Her Majesty's Government of his sincere desire to preserve the amicable relations which now happily subsist between the two countries."

Mr. Cass, Sec. of State, to Lord Napier, Apr. 6, 1858. MSS. Notes, Gr. Brit.

"I have had the honor to receive the copy which your lordship did me the favor to send me of Lord Malmesbury's dispatch to your lordship of August 18, in reference to Sir William Ouseley's mission, and have submitted it to the consideration of the President. From the statement of Lord Malmesbury that the British Government has no remaining alternative but that of leaving the Cabinet of Washington to originate any further overtures for an adjustment of these contro-

versies, it is quite obvious that the position of the President on this subject is not correctly understood by Her Majesty's Government. Since the announcement by your lordship in October, 1857, of Sir William Ouseley's special mission, the President has awaited not so much any new proposition for the adjustment of the Central American question as the statement in detail which he had been led to expect of the method by which Sir William Ouseley was to carry into effect the previous proposition of the British Government. To make this plain, your lordship will pardon me for making a brief reference to what has occurred between the two Governments in respect to Central America since the ratification of the Clayton-Bulwer treaty of 1850.

"While the declared object of that convention had reference to the construction of a ship-canal, by the way of San Juan and the lakes of Nicaragua and Managua, from the Atlantic to the Pacific oceans, yet it avowed none the less plainly a general principle in reference to all practicable communications across the Isthmus, and laid down a distinct policy by which the practical operation of this principle was likely to be kept free from all embarrassment. The principle was that the interoceanic routes should remain under the sovereignty of the states through which they ran, and be neutral and free to all nations alike. The policy was, that in order to prevent any Government outside of those states from obtaining undue control or influence over these interoceanic transits, no such nation should 'erect or maintain any fortifications commanding the same, or in vicinity thereof, or should occupy or fortify or colonize or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America.'

"So far as the United States and Great Britain were concerned, these stipulations were expressed in unmistakable terms, and in reference to other nations it was declared that the contracting parties in this convention engage to invite every state with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other. At that time the United States had no possessions whatever in Central America and exercised no dominion there. In respect to this Government, therefore, the provisions of the first article of the treaty could operate only as a restriction for the future, but Great Britain was in the actual exercise of dominion over nearly the whole eastern coast of that country, and in relation to her this article had a present as well as a prospective operation. She was to abandon the occupancy which she already had in Central America, and was neither to make acquisitions or erect fortifications or exercise dominion there in the future. In other words, she was to place herself in the same position, with respect to possessions and dominion in Central America, which was to be occupied by the United States, and which both the contracting parties to the treaty engaged that they would endeavor to induce other nations to occupy. This was the treaty as it was understood and assented to by the United States, and this is

the treaty as it is still understood by this Government. Instead, however, of giving effect to it in this sense, the British Government proceeded, in 1851, only a few months after the signature to the treaty, to establish a new British colony in Central America under the name of the 'Bay Islands,' and when this Government expressed its great surprise at this proceeding and at the failure of Great Britain to comply with the terms of the convention, Her Majesty's Government replied that the islands already belonged to Great Britain at the date of the treaty, and that the convention, in their view of it, interfered with none of their existing possessions in Central America, but was wholly prospective in its character, and only prevented them from making new acquisitions. It is unnecessary to do more than simply refer to the earnest and able discussions which followed this avowal, and which show more and more plainly the opposite constructions which were placed upon the treaty by the two Governments.

"In 1854 it was sought to reconcile these constructions and to terminate the Central American question by the convention which was signed at London by the American minister and Lord Clarendon, usually designated the Dallas-Clarendon treaty. The terms of this treaty are doubtless familiar to your lordship.

"It provides—

"1. For the withdrawal of the British protectorate over the Mosquito Indians and for an arrangement in their behalf upon principles which were quite acceptable to the United States.

"2. It regulated the boundaries of the Belize settlements, within which Great Britain claimed to exercise certain possessory rights upon terms which, although not wholly acceptable to this Government, were yet in a spirit of generous concession ratified by the United States Senate.

"3. It provided for a cession of the Bay Islands to Honduras (in the opinion of this Government their rightful proprietor), but this concession was made dependent upon an unratified treaty between Great Britain and Honduras, whose terms were not officially known to this Government, but which, so far as they had unofficially appeared, were not of a satisfactory character.

"The Senate, therefore, in ratifying the Dallas-Clarendon treaty, felt obliged to amend it by striking out all that part of it which contemplated the concurrence of this Government in the treaty with Honduras, and simply providing for a recognition by the two Governments of the sovereign right of Honduras to the islands in question. Great Britain found itself unable to concur in this amendment, and the Dallas-Clarendon treaty, therefore, fell to the ground. It was clear, however, that the objections of the Senate to the Honduras treaty were not deemed unreasonable by Her Majesty's Government, because, in your lordship's interview with the President on the 22d of October, 1857, your lordship 'allowed that the articles establishing the administrative

independence of the islands might have been larger than was necessary. I had observed,' you added, 'the same impression in the correspondence of Mr. Wyke, Her Majesty's chargé d'affaires at Guatemala, who seemed to admit that a greater participation in the internal Government might be granted to the authorities of Honduras,' and you made 'no doubt that Her Majesty's Government would entertain any reasonable suggestions which might be offered to them in that sense.'

"And again, in your lordship's note to this Department of November 30, 1857, you recognize the same probability 'that the intervention of the Honduras Government in the administration of the islands may have been more limited than was necessary or even advisable.'

"Such was doubtless the opinion of Honduras, for as long ago as May 10, 1857, I was informed by your lordship that the treaty remained unratified 'owing to some objections on the part of the Government of Honduras,' and that 'Her Majesty's Government does not expect that the treaty in its present shape will be definitely sanctioned by that Republic.'

"In view of the objectionable provisions of this convention with Honduras, and of its failure to be sanctioned by that Republic, your lordship, by the authority of Lord Clarendon, informed me on the 6th of May, 1857, that Her Majesty's Government was prepared to sanction a new treaty, in respect to the Central American questions, which should in all respects conform to the Dallas-Clarendon treaty, as ratified by the Senate, except that to the simple recognition in the Senate's substitute for the second separate article of the sovereignty of Honduras over the Bay Islands there was to be added the following passage: 'Whenever and so soon as the Republic of Honduras shall have concluded and ratified a treaty with Great Britain by which Great Britain shall have ceded and the Republic of Honduras shall have accepted the said islands subject to the provisions and conditions contained in said treaty.' While this condition contemplated a new treaty with Honduras which might possibly avoid the objectionable provisions of the old one, yet it was quite impossible for the United States to become a party, either directly or indirectly, to a convention which was not in existence, or whose terms and conditions it could neither know nor control. For this reason I informed your lordship in my communication of May 29, that your lordship's proposition was declined by this Government.

"The attempts to adjust the Central American questions by means of a supplementary treaty having thus failed of success, and the subject not being of a character, in the opinion of the United States, to admit of their reference to arbitration, the two Governments were thrown back upon their respective rights under the Clayton-Bulwer treaty. While each Government, however, had continued to insist upon its own construction of this treaty, there was reason to believe that the embarrassments growing out of their conflicting views of its provisions might

be practically relieved by direct negotiation between her Majesty's Government and the States of Central America.

"In this way it seemed possible that, without any injustice to those States, the treaty might be rendered acceptable to both countries as well as operative for the disinterested and useful purposes which it had been designed to serve. The President, therefore, was glad to learn from your lordship, on the 19th of October, 1857, that Her Majesty's Government had 'resolved to dispatch a representative of authority and experience to Central America, to make a definitive settlement of all the matters with regard to which the United States and England were still at variance, and who would be instructed,' as your lordship believed, 'to carry the Clayton-Bulwer treaty into execution according to the general tenor of the interpretation put upon it by the United States, but to do so by separate negotiations with the Central American Republics in lieu of a direct engagement with the Federal Government.' This announcement could not fail to be received with satisfaction by the President, because it contemplated the substantial accomplishment of the very purposes in respect to the treaty which the United States had always had in view, and so long as these were accomplished he assured your lordship that 'to him it was indifferent whether the concession contemplated by Her Majesty's Government were consigned to a direct engagement between England and the United States or to treaties between the former and the Central American Republics; the latter method might, in some respects, he added, be even more agreeable to him, and he thought it would be more convenient to Her Majesty's Government, who might, with greater facility, accede to the claims of the weaker party.' * * *

"The explanations, however, anticipated by your lordship and by myself were not received, and about three months after the arrival of Sir William at Washington you expressed to me your regret that you had held out expectations which proved unfounded, and which had prompted delay, and then for the first time requested an answer to the proposals of Her Majesty's Government, and 'especially to that part of them relating to the arbitration.' It was even then suggested that the answer was desired because it was thought to be appropriate as a matter of form and not because the explanations which had been waited for were deemed wholly unnecessary. 'I overlooked something due to forms,' is your lordship's language in the note of April 12, 'in my anxiety to promote a clearer understanding, and I eventually learned in an official shape that Her Majesty's Government, following their better judgment, desired, before making any further communication, a reply to their overtures, and especially to that part of them referring to arbitration.' Should the new proffer of arbitration be declined, it was clearly not supposed in your note of February 15 that this result would have any tendency to interrupt Sir William's efforts; but in that event it was hoped, you informed me, that these efforts would result in a settle-

ment agreeable to the United States, inasmuch as in essential points it would carry the treaty of 1850 into operation in a manner practically conformable to the American interpretation of that instrument. [Here follows a recapitulation of note of April 6, above given.]

"The neutrality of the interoceanic routes and their freedom from the superior and controlling influence of any one Government, the principles upon which the Mosquito Protectorate may be arranged, alike with justice to the sovereignty of Nicaragua and the Indian tribes, the surrender of the Bay Islands under certain stipulations for the benefit of trade and the protection of their British occupants, and the definition of the boundaries of the British Belize—about all these points there is no apparent disagreement except as to the conditions which shall be annexed to the Bay Islands' surrender, and as to the limits which shall be fixed to the settlements of the Belize. Is it possible that, if approached in a spirit of conciliation and good feeling, these two points of difference are not susceptible of a friendly adjustment? To believe this would be to underestimate the importance of the adjustment, and the intelligent appreciation of this importance which must be entertained by both nations.

"What the United States want in Central America, next to the happiness of its people, is the security and neutrality of the interoceanic routes which lead through it. This is equally the desire of Great Britain, of France, and of the whole commercial world. If the principles and policy of the Clayton-Bulwer treaty are carried into effect, this object is accomplished. When, therefore, Lord Malmesbury invites new overtures from this Government upon the idea that it has rejected the proposal embraced in Sir William Ouseley's mission for an adjustment of the Central American questions by separate treaties with Honduras, Nicaragua, and Guatemala, upon terms substantially according with the general tenor of the American interpretation of the treaty, I have to reply that this very adjustment is all that the President ever desired, and that instead of having rejected that proposal he had expressed his cordial acceptance of it so far as he understood it, and had anticipated from it the most gratifying consequences.

"Nothing now remains for me but to inquire of your lordship whether the overtures contained in your lordship's note of November 30, are to be considered as withdrawn by Her Majesty's Government, or whether the good results expected in the beginning from Sir William Ouseley's mission may not yet be happily accomplished."

Mr. Cass, Sec. of State, to Lord Napier, Nov. 8, 1858. MSS. Notes, Gr. Brit.

"Our relations with Great Britain are of the most friendly character. Since the commencement of my administration the two dangerous questions arising from the Clayton and Bulwer treaty, and from the right of search claimed by the British Government, have been amicably and honorably adjusted.

"The discordant constructions of the Clayton and Bulwer treaty between the two Governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this Government. In my last annual message I informed Congress that the British Government had not then 'completed treaty arrangements with the Republics of Honduras and Nicaragua in pursuance of the understanding between the two Governments. It is, nevertheless, confidently expected that this good work will ere long be accomplished.' This confident expectation has since been fulfilled. Her Britannic Majesty concluded a treaty with Honduras on the 28th November, 1859, and with Nicaragua on the 28th August, 1860, relinquishing the Mosquito protectorate. Besides, by the former, the Bay Islands are recognized as a part of the Republic of Honduras. It may be observed that the stipulations of these treaties conform in every important particular to the amendments adopted by the Senate of the United States to the treaty concluded at London on the 17th October, 1856, between the two Governments. It will be recollected that this treaty was rejected by the British Government, because of its objection to the just and important amendment of the Senate to the article relating to Ruatan and the other islands in the Bay of Honduras."

President Buchanan, Fourth Annual Message, 1860.

"Towards the close of Mr. Polk's administration the British Government, disturbed, perhaps, by the recent acquisition of territory by the United States on the Pacific, showed what we thought to be a disposition to contend with the Governments of the Central American States, with the ultimate object, as was supposed, of acquiring dominion there, and also a control of any ship-canal which might be made between the two oceans by the way of the San Juan River and Lake Nicaragua. British subjects had long before that time lent those Governments money, the interest on which was in arrears, chiefly in consequence of the strife between the States which ensued upon their separation and as a confederacy.

"War measures were determined upon to recover this interest; among others, the seizure of the island of Tiger, belonging to Honduras, in the Bay of Fonseca, was made by a British naval force in October, 1849. This seizure was protested against by Mr. Squier, the United States chargé d'affaires in Nicaragua, and a disavowal of the proceedings by the British Government was required by Mr. Clayton in an instruction to Mr. Abbott Lawrence, at London, of the 29th of December, 1849.

"Inasmuch as one route (by some supposed the best route) for the ship-canal from the lake to the Pacific lay along the Estero Real, which empties into the Bay of Fonseca, near Tiger Island, Mr. Squier deemed himself warranted in incorporating in a general commercial treaty with Honduras, which he signed on the 28th of September, 1849, provisions

for acquiring land for naval stations on that island or on the continent in its vicinity. By what is called a protocol, of the same date, Honduras ceded Tiger Island to the United States, pending the ratification or rejection of the general treaty, provided that the time should exceed eighteen months.

"These stipulations were entered into by Mr. Squier without instructions from the Department, and when the treaty and additional articles were received, he was reproved for them. They were never laid before the Senate. It is not to be doubted, however, that they occasioned uneasiness to the British Government, and in a great degree led to the Clayton-Bulwer treaty of the 19th of April, 1850.

"The preamble of that treaty states that its object was to fix the views and intentions of the parties in regard to the ship-canal.

"The first article of the treaty, still referring to the ship-canal, stipulates that neither party will erect fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume, or exercise dominion in any part of Central America.

"It seems obvious that the renunciation by the parties to this instrument of a right to acquire dominion in Central America was intended to prevent either of them from obtaining control over the proposed ship-canal. At the time the treaty was concluded there was every prospect that that work would not only soon be begun, but that it would be carried to a succesful conclusion. For reasons, however, which it is not necessary to specify, it never was even commenced, and at present there does not appear to be a likelihood of its being undertaken. It may be a question, therefore, supposing that the canal should never be begun, whether the renunciatory clauses of the treaty are to have perpetual operation.

"Technically speaking, this question might be decided in the negative. Still, so long as it should remain a question, it would not comport with good faith for either party to do anything which might be deemed contrary to even the spirit of the treaty.

"It is becoming more and more certain every day that not only naval warfare in the future, but also all navigation of war vessels in time of peace, must be by steam. This necessity will occasion little or no inconvenience to the principal maritime powers of Europe, and especially to Great Britain, as those powers have possessions in various parts of the globe where they can have stores of coal and provisions for the use of their vessels. We are differently situated. We have no possession beyond the limits of the United States. Foreign colonization has never been favored by statesmen in this country either on general grounds or as in harmony with our peculiar condition. There is no change or likely to be any in this respect. It is indispensable for us, however, to have coaling stations under our own flag for naval observation and police, and for defensive war as well as for the protection of our widely-spread commerce when we are at peace ourselves. This want, even for our

commercial marine, is nowhere more sensibly felt than on the track between Panama and San Francisco. The question then occurs what points beyond our jurisdiction would be most eligible for this purpose?

"Whatever opinion might be entertained in regard to any other sites, there would be no question that Tiger Island would be exceedingly desirable for that purpose.

"Under these circumstances, you will sound Lord Clarendon as to the disposition of his Government to favor us in acquiring coaling stations in Central America, notwithstanding the stipulations contained in the Clayton-Bulwer treaty. In doing this, however, you will use general terms only, and will by no means allow it to be supposed that we particularly covet Tiger Island. You will execute this instruction at such time and in such way as to you may seem best, and inform the Department of the result, so that the United States minister to Honduras may be directed to proceed accordingly.

"It is supposed that you may probably be able to introduce the subject to the Earl of Clarendon's attention by suggesting that a negotiation with a view to the special end mentioned might be made an element in a general negotiation for settlement of the northwest boundary question and of the conflicting claims of the two countries which have arisen during the late rebellion in the United States."

Mr. Seward, Sec. of State, to Mr. Adams, April 25, 1866. MSS. Inst., Gr. Brit.

The report of Mr. Fish, Secretary of State, July 14, 1870, on the relation of the Monroe doctrine to Central America, in connection with the Clayton-Bulwer treaty, is given at large, *supra*, § 57.

"You are aware that a main object of the Clayton-Bulwer treaty, so called, of the 19th of April, 1850, was to provide against obstruction by either party to a ship-canal to the Pacific through Nicaragua. A work of that kind was then deemed specially necessary and desirable for us, as California had recently been acquired, the only practicable way to which was across the Isthmus of Panama, or around Cape Horn. For some time previously to the date of that instrument, and especially during the considerable period when the United States were without a diplomatic representative in Central America, it seemed to be the policy of the British Government to avail itself of what was called its protectorate of the King of Mosquitos to wrest from Nicaragua that part of its territory claimed on behalf of that Indian chief, including, of course, the months of the San Juan River, by the way of which it was supposed the proposed ship-canal must pass. The Clayton-Bulwer treaty effectually checked this pretension. It also in terms forbade either party to occupy or fortify in any part of Central America. The British Government, probably actuated by an apprehension that this stipulation might be construed against their claims at Belize, Honduras, instructed Sir H. L. Bulwer to make the declaration of 29th of June, 1850, when the ratifications were to be exchanged, to the effect that they did not understand

the engagements of the convention to apply to Belize and its dependencies. In a note to Sir Henry of the 4th of July, 1850, Mr. Clayton acknowledged that it was not the purpose of the convention to apply to Belize and its dependencies.

"A similar acknowledgment is contained in a memorandum of the 5th of July, 1850, signed by Mr. Clayton, which says that he at the same time declined to affirm or deny the British title in their settlement or its alleged dependencies. Among the latter what are called the Bay Islands were claimed to belong. The British Government, however, having converted them into a separate colony, this and the continuance of its protectorate, so called, over the Mosquito Indians, were regarded as virtually such breaches of the Clayton-Bulwer treaty as to call for the remonstrances which Mr. Buchanan, and subsequently Mr. Dallas, were instructed to address, and which they did address, to that Government. The answer of that Government was in substance that the Clayton-Bulwer treaty was merely designed to provide for the future, and was not intended to affect any rights or claims which Great Britain may have had in Central America at the time of its conclusion. This pretension was effectually answered by Mr. Buchanan in his reply to Lord Clarendon's memorandum on the subject, which you will find on the file or record of your legation. Ultimately, on the 17th of October, 1856, what is called the Dallas-Clarendon treaty was signed at London. The object of this instrument was to compose the differences between the two Governments, especially in regard to the Bay Islands and the Mosquito protectorate. When the treaty reached here it must have been obvious to the Executive that if it accomplished either of those purposes this was in an incomplete and unacceptable way. Still the treaty was laid before the Senate, which body, though it did not absolutely reject it, appended to it so many and such important amendments that they were not accepted by the British Government, and the whole business proved abortive.

"The British Government then sought negotiations with Nicaragua, Guatemala, and Honduras, separately, to attain the principal objects which it hoped to compass by means of the Dallas-Clarendon treaty, if it had gone into effect as it was signed.

"The purposes of that Government were in the main accomplished. On the 28th of January, 1860, a treaty between Great Britain and Nicaragua was signed at Managua. Though this instrument restored to that Republic the nominal sovereignty over that part of its territory which had previously been claimed as belonging to the kingdom of the Mosquitos, it assigned boundaries to the Mosquito Reservation probably beyond the limits which any member of that tribe had ever seen, even when in chase of wild animals. Worst of all, however, it confirmed the grants of land previously made in Mosquito territory. The similar stipulation on this subject in the Dallas-Clarendon treaty was perhaps the most objectionable of any, as it violated the cardinal rule of all

European colonists in America, including Great Britain herself, that the aborigines had no title to the soil which they could confer upon individuals.

"This rule has repeatedly been confirmed by judicial decisions, and especially by the Supreme Court of the United States. It is supposed to be superfluous to add that it is understood the grantees of the Mosquito chief, respecting whose interests the British Government was so solicitous, were the subjects of the latter.

"It is supposed that the expedition of Walker to Nicaragua made such an unfavorable impression on public opinion there, in respect to this country, as to prepare the way for the treaty with Great Britain. A rumor was current in that quarter, and was by many believed to be true, that Walker was an agent of this Government, which, it was supposed, had covertly sent him thither to obtain control of the country. This, however, was so far from the truth that everything within its power was done by this Government towards preventing the departure of Walker.

"Besides the treaty with Nicaragua, just adverted to, there was a treaty between Great Britain and Honduras, signed on the 28th November, 1859, the main object of which was the restitution to the latter of the Bay Islands, which had for some time before been converted into a British colony.

"This treaty also contained stipulations in regard to Mosquito Indians in Honduras territory similar to that in the treaty with Nicaragua.

"On the 30th of April, 1859, a treaty between Great Britain and Guatemala was also signed, by which the boundaries of the British settlement at Belize, so called, were extended to the Sarstoon River. This instrument contained provisions for the appointment of commissioners to mark the boundaries, and for the construction of a road from Guatemala to the fittest place on the Atlantic coast near Belize. By a supplementary convention between the parties, of the 5th of August, 1863, Great Britain agreed, upon certain conditions, to contribute fifty thou sand pounds sterling towards the construction of the road referred to.

"From the note of the 4th of December last, addressed to this Department by Mr. Dardon, the minister of Guatemala here, a copy of which is inclosed, it appears that when the joint commission for running the boundary line reached the Sarstoon River the British commissioner, finding that his countrymen were trespassing beyond that limit, refused to proceed, and the stipulation on the subject, if not virtually canceled, has, at least, been suspended.

"The supplementary convention not having been ratified by Guatemala in season, it is stated that the British Government has notified that of Guatemala that it would regard the stipulation on the subject of the road contained in the treaty of 1859 as at an end.

"Other important information on these subjects is contained in the letter and its accompaniments of Mr. Henry Savage, to this Depart-

ment of the 16th of October last, a copy of which is inclosed. He is a native of this country and at one time was consul at Guatemala.

"He has frequently, in the absence of a diplomatic agent of the United States in that quarter, furnished this Department with valuable information in regard to Central American affairs.

"Mr. Dardon says that his Government also regards its treaty of 1859 with Great Britain at an end, and requests on its behalf the cooperation and support of this Government toward preventing further encroachments by British subjects on the territory of Guatemala. It is believed that if such encroachments are authorized or countenanced by that Government it will be tantamount to a breach of its engagement not to occupy any part of Central America. Before, however, officially mentioning the subject to Earl Granville, it would be advisable to ascertain the correctness of the representation of Mr. Dardon, as to the cause of the discontinuance of the demarkation of the boundary.

"If the statement of that gentleman should prove to be correct, you will then formally remonstrate against any trespass by British subjects, with the connivance of their Government, upon the territory of Guatemala, as an infringement of the Clayton-Bulwer treaty, which will be very unacceptable in this country."

Mr. Fish, Sec. of State, to Mr. Schenck, Apr. 26, 1872. MSS. Inst., Gr. Brit.

"Aside from the well understood doctrines of this Government as to any new acquisitions of American territory by European powers, it seems unquestionable that the Clayton-Bulwer treaty precludes the acquisition of those islands by Great Britain. The intentions which are imputed, therefore, to that power, looking in that direction may well be discredited. Still they should awaken the attention and arouse the vigilance of this Government. Even should the tendency you report toward the alienation of the Bay Islands take another direction, it would, of course, be impossible for us to remain indifferent or to acquiesce in any other European power acquiring any of them."

Mr. Evarts, Sec. of State, to Mr. Logan, Mar. 4, 1880. MSS. Inst., Cent. Am.
As to the Isthmus, see more fully *infra*, §§ 287 *ff.*

"In pursuance of the premises laid down in my circular note of June 24 of this year touching the determination of this Government with respect to the guarantee of neutrality for the interoceanic canal at Panama, it becomes my duty to call your attention to the convention of April 19, 1850, between Great Britain and the United States, commonly known as the Clayton-Bulwer treaty.

"According to the articles of that convention the high contracting parties, in referring to an interoceanic canal through Nicaragua, agreed 'that neither the one nor the other will ever obtain or maintain for itself any exclusive control over said ship-canal, and that neither will ever erect or maintain any fortifications commanding the same or in the vicinity thereof.' In a concluding paragraph the high contracting

parties agreed 'to extend their protection by treaty stipulations to any other practical communications, whether by canal or railway, across the Isthmus * * * which are now proposed to be established by way of Tehuantepec or Panama.'

"This convention was made more than thirty years ago, under exceptional and extraordinary conditions, which have long since ceased to exist—conditions which at best were temporary in their nature, and which can never be reproduced.

"The remarkable development of the United States on the Pacific coast since that time has created new duties for this Government, and devolved new responsibilities upon it, the full and complete discharge of which requires in the judgment of the President some essential modifications in the Clayton-Bulwer treaty. The interests of Her Majesty's Government involved in this question, in so far as they may be properly judged by the observation of a friendly power, are so inconsiderable in comparison with those of the United States that the President hopes a readjustment of the terms of the treaty may be reached in a spirit of amity and concord.

"The respect due to Her Majesty's Government demands that the objections to the perpetuity of the convention of 1850, as it now exists, should be stated with directness and with entire frankness. And among the most salient and palpable of these is the fact that the operation of the treaty practically concedes to Great Britain the control of whatever canal may be constructed. * * *

"The treaty binds the United States not to use its military force in any precautionary measure, while it leaves the naval power of Great Britain perfectly free and unrestrained; ready at any moment of need to seize both ends of the canal, and render its military occupation on land a matter entirely within the discretion of Her Majesty's Government.

"The military power of the United States, as shown by the recent civil war, is without limit, and in any conflict on the American continent altogether irresistible. The Clayton-Bulwer treaty commands this Government not to use a single regiment of troops to protect its interests in connection with the interoceanic canal, but to surrender the transit to the guardianship and control of the British navy. If no American soldier is to be quartered on the Isthmus to protect the rights of his country in the interoceanic canal, surely, by the fair logic of neutrality, no war vessel of Great Britain should be permitted to appear in the waters that control either entrance to the canal.

"A more comprehensive objection to the treaty is urged by this Government. Its provisions embody a misconception of the relative positions of Great Britain and the United States with respect to the interests of each Government in questions pertaining to this continent. The Government of the United States has no occasion to disavow an aggressive disposition. Its entire policy establishes its pacific character,

and among its chief aims is to cultivate the most friendly and intimate relations with its neighbors, both independent and colonial. At the same time, this Government, with respect to European states, will not consent to perpetuate any treaty that impeaches our right and long-established claim to priority on the American continent. * * *

"The States and Territories appurtenant to the Pacific Ocean and dependent upon it for commercial outlet, and hence directly interested in the canal, comprise an area of nearly eight hundred thousand square miles, larger in extent than the German Empire and the four Latin countries of Europe combined. * * *

"If a hostile movement should at any time be made against the Pacific coast, threatening danger to its people and destruction to its property, the Government of the United States would feel that it had been unfaithful to its duty and neglectful towards its own citizens if it permitted itself to be bound by a treaty which gave the same right through the canal to a war ship bent on an errand of destruction that is reserved to its own Navy, sailing for the defense of our coast and the protection of the lives of our people. And as England insists by the might of her power that her enemies in war shall strike her Indian possessions only by doubling the Cape of Good Hope, so the Government of the United States will equally insist that the interior, more speedy, and safer route of the canal shall be reserved for ourselves, while our enemies, if we shall ever be so unfortunate as to have any, shall be remanded to the voyage around Cape Horn.

"A consideration of controlling influence in this question is the well-settled conviction on the part of this Government that only by the United States exercising supervision can the Isthmus canals be definitely and at all times secured against the interference and obstruction incident to war. A mere agreement of neutrality on paper between the great powers of Europe might prove ineffectual to preserve the canal in time of hostilities. The first sound of a cannon in a general European war would in all probability annul the treaty of neutrality, and the strategic position of the canal, commanding both oceans, might be held by the first naval power that could seize it. If this should be done the United States would suffer such grave inconvenience and loss in her domestic commerce as would enforce the duty of a defensive and protective war on her part for the mere purpose of gaining that control which in advance she insists is due to her position and demanded by her necessities.

"I am not arguing or assuming that a general war, or any war at all, is imminent in Europe. But it must not be forgotten that within the past twenty-five years all the great powers of Europe have been engaged in war; most of them more than once. In only a single instance in the past hundred years has the United States exchanged a hostile shot with any European power. It is in the highest degree im-

probable that for a hundred years to come even that experience will be repeated.

"It consequently becomes evident that the one conclusive mode of preserving any Isthmus canal from the possible distraction and destruction of war is to place it under the control of that Government least likely to be engaged in war, and able, in any and every event, to enforce the guardianship which she shall assume.

"For self-protection to her own interests, therefore, the United States in the first instance asserts her right to control the Isthmus transit. And, secondly, she offers by such control that absolute neutralization of the canal as respects European powers which can in no other way be certainly attained and lastingly assured.

"Another consideration forcibly suggests the necessity of modifying the convention under discussion. At the time it was agreed to, Great Britain and the United States were the only nations prominent in the commerce of Central and South America. Since that time other leading nations have greatly enlarged their commercial connections with that country, and are to-day contending for supremacy in the trade of those shores. Within the past four years, indeed, the number of French and German vessels landing on the two coasts of Central America far exceed the number of British vessels. * * *

"One of the motives that originally induced this Government to assent to the Clayton-Bulwer treaty, not distinctly expressed in the instrument, but inferable from every line of it, was the expected aid of British capital in the construction of the Nicaraguan canal. That expectation has not been realized, and the changed condition of this country since 1850 has diminished, if it has not entirely removed from consideration, any advantage to be derived from that source. Whenever, in the judgment of the United States Government, the time shall be auspicious and the conditions favorable for the construction of the Nicaraguan canal, no aid will be needed outside of the resources of our own Government and people; and while foreign capital will always be welcomed and never repelled, it cannot henceforth enter as an essential factor in the determination of this problem.

"It is earnestly hoped by the President that the considerations now presented will have due weight and influence with Her Majesty's Government, and that the modifications of the treaty desired by the United States will be conceded in the same friendly spirit in which they are asked. The following is a summary of the changes necessary to meet the views of this Government:

"First. Every part of the treaty which forbids the United States fortifying the canal and holding the political control of it in conjunction with the country in which it is located to be canceled.

"Second. Every part of the treaty in which Great Britain and the United States agree to make no acquisition of territory in Central America to remain in full force. As an original proposition, this Gov-

ernment would not admit that Great Britain and the United States should be put on the same basis, even negatively, with respect to territorial acquisitions on the American continent, and would be unwilling to establish such a precedent without full explanation. But the treaty contains that provision with respect to Central America, and if the United States should seek its annulment, it might give rise to erroneous and mischievous apprehensions among a people with whom this Government desires to be on the most friendly terms. The United States has taken special occasion to assure the Spanish-American Republics to the south of us that we do not intend and do not desire to cross their borders or in any way disturb their territorial integrity, and we shall not willingly incur the risk of a misunderstanding by annulling the clauses in the Clayton-Bulwer treaty which forbid such a step with Central America. The acquisition of military and naval stations necessary for the protection of the canal and voluntarily ceded to the United States by the Central American States not to be regarded as a violation of the provisions contained in the foregoing.

"Third. The United States will not object to maintaining the clause looking to the establishment of a free port at each end of whatever canal may be constructed, if England desires it to be retained.

"Fourth. The clause in which the two Governments agreed to make treaty stipulations for a joint protectorate of whatever railway or canal might be constructed at Tehuantepec or Panama has never been perfected. No treaty stipulations for the proposed end have been suggested by either party, although citizens of the United States long since constructed a railway at Panama, and are now engaged in the same work at Tenhuantepec. It is a fair presumption, in the judgment of the President, that this provision should be regarded as obsolete by the nonaction and common consent of the two Governments.

"Fifth. The clause defining the distance from either end of the canal where in time of war captures might be made by either belligerent on the high seas was left incomplete, and the distance was never determined. In the judgment of the President, speaking in the interest of peaceful commerce, this distance should be made as liberal as possible, and might, with advantage, as a question relating to the high seas and common to all nations, be a matter of stipulation between the great powers of the world.

"In assuming as a necessity the political control of whatever canal or canals may be constructed across the Isthmus, the United States will act in entire harmony with the Governments within whose territory the canals shall be located. Between the United States and the other American Republics there can be no hostility, no jealousy, no rivalry, no distrust. This Government entertains no design in connection with this project for its own advantage, which is not also for the equal or greater advantage of the country to be directly and immediately affected. Nor does the United States seek any exclusive or narrow commercial

dvantage. It frankly agrees and will by public proclamation declare t the proper time, in conjunction with the Republic on whose soil the anal may be located, that the same rights and privileges, the same tolls nd obligations for the use of the canal, shall apply with absolute im- artiality to the merchant marine of every nation on the globe. And qually in time of peace, the harmless use of the canal shall be freely ranted to the war vessels of other nations. In time of war, aside from he defensive use to be made of it by the country in which it is con- tructed and by the United States, the canal shall be impartially closed gainst the war vessels of all belligerents.

"It is the desire and determination of the United States that the anal shall be used only for the development and increase of peaceful ommerce among all the nations, and shall not be considered a strategic oint in warfare, which may tempt the aggression of belligerents or be eized under the compulsions of military necessity by any of the great owers that may have contests in which the United States has no stake nd will take no part.

"If it be asked why the United States objects to the assent of Euro- ean Governments to the terms of neutrality for the operation of the anal, my answer is that the right to assent implies the right to dis- ent, and thus the whole question would be thrown open for contention s an international issue. It is the fixed purpose of the United States o confine it strictly and solely as an American question, to be dealt ith and decided by the American Government.

"In presenting the views contained herein to Lord Granville, you will ake occasion to say that the Government of the United States seeks his particular time for the discussion as most opportune and auspicious. t no period since the peace of 1783 have relations between the British nd American Governments been so cordial and friendly as now. And am sure Her Majesty's Government will find in the views now sug- ested and the propositions now submitted additional evidence of the esire of this Government to remove all possible grounds of controversy etween two nations which have so many interests in common and so any reasons for honorable and lasting peace.

"You will, at the earliest opportunity, acquaint Lord Granville with he purpose of the United States touching the Clayton-Bulwer treaty, nd in your own way you will impress him fully with the views of your overnment.

"I refrain from directing that a copy of this instruction be left with is lordship, because in reviewing the case I have necessarily been com- elled in drawing illustrations from British policy to indulge somewhat eely in the *argumentum ad hominem*.

"This course of reasoning in an instruction to our own minister is al- ogether legitimate and pertinent, and yet might seem discourteous if ddressed directly to the British Government. You may deem it expe-

dient to make this explanation to Lord Granville, and if, afterward, he shall desire a copy of this instruction, you will of course furnish it."

Mr. Blaine, Sec. of State, to Mr. Lowell, Nov. 19, 1881. MSS. Inst., Gr. Brit.; For. Rel., 1881.

"In the discussions between the two Governments which attended the failure of the Clarendon-Dallas treaty the attitude of the United States with respect to the Clayton-Bulwer treaty was amply defined. As early as the 12th of March, 1857, I find that General Cass, then Secretary of State, in the course of a conference with Lord Napier, Her Majesty's representative 'passed some reflection on the Clayton-Bulwer treaty; he had voted for it, and in doing so he believed that it abrogated all intervention on the part of England in the Central American territory. The British Government had put a different construction on the treaty, and he regretted the vote he had given in its favor.' (Dispatch of Lord Napier to the Earl of Clarendon, March 12, 1857.)

"On the 6th of May, 1857, President Buchanan, in an audience given to Lord Napier and in response to his lordship's suggestion that if the attempted adjustment of the difference between the Governments as to the Clarendon-Dallas treaty should fail, the Clayton-Bulwer treaty remained to fall back upon, characterized that instrument in much stronger terms than General Cass had done. To quote Lord Napier's words:

"'The President denounced the Clayton-Bulwer treaty as one which has been fraught with misunderstanding and mischief from the beginning. It was concluded under the most opposite constructions by the contracting parties. If the Senate had imagined that it could obtain the interpretation placed upon it by Great Britain it would not have passed. If he had been in the Senate at the time, that treaty never would have been sanctioned.' (Dispatch of Lord Napier to the Earl of Clarendon, May 6, 1854.)

"These views are more explicitly and formally repeated in a note addressed by Secretary Cass to Lord Napier on the 29th of May, 1857. He says:

"'The Clayton-Bulwer treaty, concluded in the hope that it would put an end to the differences which had arisen between the United States and Great Britain concerning Central American affairs, had been rendered inoperative in some of its most essential provisions by the different constructions which had been reciprocally given to it by the parties. And little is hazarded in saying that had the interpretation since put upon the treaty by the British Government, and yet maintained, been anticipated, it would not have been negotiated under the instructions of any Executive of the United States nor ratified by the branch of the Government intrusted with the power of ratification.'

"The publicity of these statements, and the strong feeling which then prevailed in all quarters that the Clayton-Bulwer convention was inadequate to reconcile the opposite views of Great Britain and the

United States towards Central America, led to a very decided conviction that the treaty should be abrogated. Lord Napier reflected this growing impression when, on the 22d of June, 1857, he wrote to Lord Clarendon that 'it is probable that if the pending discussion regarding Central America be not closed during the present summer, an attempt will be made in the next session of Congress to set aside the Clayton-Bulwer treaty. * * * There can be no doubt of the views of the President and Cabinet on this matter.'

"Before this tendency could, however, find its expression in any official act, a movement on the part of Her Majesty's Government placed the whole matter in a new aspect.

[Here follows a summary of Sir W. Ouseley's action substantially the same as that given above by Mr. Cass.]

"The situation, then, at the close of 1857, presented a triple dead lock.

"The United States had agreed not to move toward the abrogation of the treaty until it could be seen what interpretation of its provisions would result from Sir William Ouseley's mission. Sir William had received positive instructions not to move until the United States should decide whether to abrogate the treaty or not, and Lord Napier was forbidden to move until the United States should make formal answer to the proposal for arbitration. The instructions of Lord Clarendon to Lord Napier, January 22, 1858, contained these words:

"'We are decidedly of opinion that it would neither be consistent with our dignity or our interest to make any proposal to the United States Government until we have received a formal answer to our former offer of arbitration. In event of the offer being refused, it will be a great and hardly justifiable proof of the spirit of conciliation by which we are animated if we then show ourselves disposed to abrogate the Clayton-Bulwer treaty; but we must not be in too great haste.'

"In order, apparently, to break this dead lock, Lord Napier wrote to General Cass, February 17, 1858, that 'something in the nature of an alternative was thus offered to the American Cabinet. Should the expedient of arbitration be adopted, a great portion of Sir William Ouseley's duty would be transferred to other agencies. Should arbitration be declined, it was hoped that the efforts of Her Majesty's envoy would result in a settlement agreeable to the United States, inasmuch as in essential points it would carry the treaty of 1850 into operation in a manner practically conformable to the American interpretation of that instrument.'

"On the 10th of March, 1858, the Earl of Malmesbury, who had succeeded Lord Clarendon in the foreign office, instructed Lord Napier that, until an answer was returned to the proposal for arbitration, 'no further steps can be taken by Her Majesty's Government with that of the United States in regard to that matter;' and, further, that 'when this point is cleared up, Her Majesty's Government, supposing that the Government of the United States decline arbitration, will have to deter-

mine whether they should originate a proposal for the abrogation of the Clayton-Bulwer treaty or adopt any other course which the circumstances at the moment may seem to recommend.'

"It appears, however, that the proposal to abrogate the treaty which Lord Malmesbury reserved the right to originate had already been communicated to the Government of the United States by Lord Napier, under instructions from Lord Clarendon. In a dispatch dated March 22, 1858, Lord Napier wrote:

"'The Earl of Clarendon authorized me to inform General Cass that Her Majesty's Government would not decline the consideration of a proposal for the abrogation of the treaty by mutual concert. * * * I have, accordingly, on two occasions, informed General Cass that if the Government of the United States be still of the same mind, and continue to desire the abrogation of the treaty of 1850, it would be agreeable to Her Majesty's Government that they should insert a proposal to that effect in their reply to my note respecting arbitration.'

"Lord Napier further reports in detail the conversations had with General Cass as to the most proper method of effecting such abrogation, if agreed to.

"In reply to this dispatch of Lord Napier, the Earl of Malmesbury instructed him, April 8, 1858, that his action was approved, and that he should confine himself to pressing for an answer to his proposal for arbitration. His lordship added these significant words:

"'Her Majesty's Government, if the initiative is still left to them by the unwillingness of the United States themselves to propose abrogation, desire to retain full liberty as to the manner and form in which any such proposal shall be laid on their behalf before the Cabinet at Washington. * * * The Clayton-Bulwer treaty has been a source of unceasing embarrassment to this country, and Her Majesty's Government, if they should be so fortunate as to extricate themselves from the difficulties which have resulted from it, will not involve themselves, directly or indirectly, in any similar difficulties for the future.'

"The answer of General Cass to Lord Napier's several proposals was, briefly, to the effect that pending the results expected from Sir William Ouseley's mission to the Central American States the United States could not adopt the alternative of arbitration, 'even if it had not been twice rejected before,' and, that if 'the President does not hasten to consider now the alternative of repealing the treaty of 1850, it is because he does not wish prematurely to anticipate the failure of Sir William Ouseley's mission, and is disposed to give a new proof to Her Majesty's Government of his sincere desire to preserve the amicable relations which now happily subsist between the two countries.' (General Cass to Lord Napier, April 6, 1858.)

"In this posture of affairs the Earl of Malmesbury instructed Sir William Ouseley to open direct negotiations with the Central American States, and on the 18th of August instructed Lord Napier to inform the

Government of the United States of the intentions and object of Her Majesty's Government in the premises. His lordship added:

"'Modification, arbitration, and abrogation of the Clayton-Bulwer treaty have been *flatly rejected* [the italics are my own]. Great Britain and Nicaragua are now about to treat as independent states.'

"I have emphasized the phrase 'flatly rejected' in view of a subsequent instruction of the Earl of Malmesbury to Lord Napier on the 8th of December, 1858, wherein he said:

"'I think you would have done better if you had not too pointedly brought before the United States Government the notion that the British Government might view with favor a proposal to abrogate the Clayton-Bulwer treaty.'

"It is not difficult, in following this narrative, to discern that General Cass, though not desiring to express it, had an additional motive for declining at that particular time to propose the abrogation of the Clayton-Bulwer treaty. He did not desire by such proposed abrogation to indicate his willingness that Sir William Gore Ouseley should make treaties with the separate States of Central America, unrestrained by the clauses of the Clayton-Bulwer treaty inhibiting the extension of British power in that region. General Cass, with his accustomed caution and wisdom, clearly perceived that for the United States to propose abrogation on the very eve of Sir William Ouseley's mission would lead to injurious inferences, and would imply conclusions which the United States was not prepared to admit.

"Objectionable as General Cass thought the Clayton-Bulwer treaty, he thought it was better than giving the implied consent of this Government that Great Britain should obtain such treaties as the force of her power might secure in Central America.

"The subsequent note of Lord Malmesbury, not strained by an uncharitable construction, throws additional light on the subject, and confirms the wisdom of General Cass in declining to propose abrogation at that time. And, besides, General Cass evidently desired to retain those very clauses of the Clayton-Bulwer treaty to which, in my dispatch of the 19th, I proposed on the part of this Government to adhere.

"I have dwelt with somewhat of detail on this particular historic episode, partly because it admirably illustrates the spirit with which both Governments have regarded the Clayton-Bulwer treaty from the first, and partly because it had more direct bearing on the question of the guarantee of any isthmian transit than any other discussion of the time. In perusing the voluminous correspondence, unprinted as well as that printed and submitted at the time to Congress and to Parliament, I am more than ever struck by the elastic character of the Clayton-Bulwer treaty, and the admirable purpose it has served as an ultimate recourse on the part of either Government to check apprehended designs in Central America on the part of the other; although all the while it was

frankly admitted on both sides that the engagements of the treaty were misunderstandingly entered into, imperfectly comprehended, contradictorily interpreted, and mutually vexatious. * * *

"My main object in writing this instruction has been to strengthen your hands in any discussion which may now ensue as to the benefits of the Clayton-Bulwer treaty and the mutual interest of the two countries in conserving it as the basis of a settlement of all disputes between them touching Central American and isthmian questions. It will be seen that, from the time of its conclusion in 1850 until the end of 1858, its provisions were thrice made the basis of a proposal to arbitrate as to their meaning, that modification and abrogation have been alike contingently considered, and that its vexatious and imperfect character has been repeatedly recognized on both sides. The present proposal of this Government is to free it from those embarrassing features, and leave it, as its framers intended it should be, a full and perfect settlement, for all time, of all possible issues between the United States and Great Britain with regard to Central America.

"If in your conferences with Earl Granville it should seem necessary, you will make free use of the precedents I have cited, and should you, within the discretionary limits confided at the end of my No. 270, have given a copy thereof to his lordship, you are equally at liberty to let him have a copy of this also, with the same explanation, that it is for your use, and not written as a formal note for communication to Her Majesty's Government."

Mr. Blaine, Sec. of State, to Mr. Lowell, Nov. 29, 1881. MSS. Inst. Gr. Brit.; For. Rel., 1881.

"Mr. Sackville West has handed me copies of two dispatches from Lord Granville to him respecting the Clayton-Bulwer treaty; the first, dated 7th January last, comments upon Mr. Blaine's 270 of the 19th of November; the second, of the 17th January, comments upon Mr. Blaine's 281 of the 29th November.

"They have been read with interest and with attention. After careful consideration, the President is not without hope that the views of the two Governments may be harmonized in this matter. He therefore directs me to communicate to you, somewhat at length, the opinions entertained here respecting the traditional continental policy of the United States and the Clayton-Bulwer treaty.

"A canal across the Isthmus for vessels of all dimensions and every character, under possible conditions hereinafter referred to, would affect this Republic in its trade and commerce; would expose our Western coast to attack; destroy our isolation; oblige us to improve our defenses and to increase our Navy, and possibly compel us, contrary to our traditions, to take an active interest in the affairs of European nations. The United States, with their large and increasing population and wealth, cannot be uninterested in a change in the physical conformation

of this hemisphere which may injuriously affect either the material or political interests of the Republic, and naturally seek that the severance of the Isthmus connecting the continents shall be effected in harmony with those interests. This Government, while believing that the Isthmus should not be severed so as to do unnecessary injury to the United States, at the same time appreciates the desire of Great Britain that she should be able, by a short and easy passage from ocean to ocean, to reach her eastern and American possessions on the Pacific, and that other nations of the world have a similar interest in such a passage. There is, however, no necessary conflict between the political claims of the United States in this matter and the material interests of other nations.

"A canal across the Isthmus can be created, and under the protectorate of the United States and the Republic whose territory it may cross can be freely used by all nations; thus in some degree would be continued to the United States the benefit of that conformation of the earth which is now an element of security and defense. * * *

"The President believes that the formation of a protectorate by European nations over the isthmus transit would be in conflict with a doctrine which has been for many years asserted by the United States. This sentiment is properly termed a doctrine, as it has no prescribed sanction and its assertion is left to the exigency which may invoke it. It has been repeatedly announced by the executive department of this Government, and through the utterances of distinguished citizens; it is cherished by the American people, and has been approved by the Government of Great Britain.

"It is not the inhospitable principle which it is sometimes charged with being and which asserts that European nations shall not retain dominion on this hemisphere and that none but republican governments shall here be tolerated; for we well know that a large part of the North American continent is under the dominion of Her Majesty's Government, and that the United States were in the past the first to recognize the imperial authority of Dom Pedro in Brazil and of Iturbide in Mexico. It is not necessary now to define that doctrine, but its history clearly shows that it at least opposes any intervention by European nations in the political affairs of American Republics. * * *

"We are thus fairly brought to the consideration of the Clayton-Bulwer treaty.

"The treaty relates to communication between the oceans, and divides itself into two parts:

"First, and principally, that which the treaty terms a 'particular object,' to wit, a then projected interoceanic canal in Central America by the Nicaragua route; and this is the only object stated in the preamble of the treaty, which says that the two Governments, 'being desirous of consolidating the relations of amity which so happily subsist between them, by setting forth and fixing in a convention their views

and intentions with reference to any means of communication by ship-canal which may be constructed between the Atlantic and Pacific Oceans by the way of the river San Juan de Nicaragua and either or both of the lakes of Nicaragua or Managua to any port or place on the Pacific Ocean,' to that end confer full powers on Mr. Clayton and Sir Henry Bulwer.

"This first and principal object of the treaty is considered in the first seven articles.

"Second. The subordinate object of the treaty is that treated of in the remaining or eighth article, which states that the two Governments 'having not only desired, in entering into this convention, to accomplish a *particular object*, but also to establish a general principle (and this is the principle), hereby agree to extend their protection by treaty stipulation to any other practicable communication' across the Isthmus, 'and especially to the interoceanic communications, should the same prove practicable, whether by canal or railroad, which are now proposed to be established by the way of Tehuantepec or Panama.' This 'general principle' or joint protection is to be effected as stated, 'by treaty stipulations.'

"Although this discussion relates to a canal by the Panama route outside of Central America, to which the eighth article refers, yet your attention is invited as well to the first and principal as to the second and subordinate purpose of the treaty.

"First. While the primary object of the treaty, as will be seen, was to aid the immediate construction of a canal by what is known as the Nicaragua route, it is equally plain that another and important object, which the United States had in view, was to dispossess Great Britain of settlements in Central America, whether under cover of Indian sovereignty or otherwise. The United States were tenacious that Great Britain should not extend further her occupation of threatening military or naval strategic points along their maritime frontier. To assure this, the parties to the treaty jointly agreed not to exercise dominion over, or fortify or colonize Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America. Great Britain, however, exercises dominion over Belize or British Honduras, the area of which is equal to that of Massachusetts, Connecticut, and Rhode Island, and the impression prevails that since the conclusion of the treaty of 1850, the English inhabitants of that district have spread into the territory of the neighboring Republics and now occupy a large area of land which, under the convention, belongs to one or the other of the two Republics, but over which the Government of Her Majesty assumes to exercise control.

"Such dominion seems to be inconsistent with that provision of the treaty which prohibits the exercise of dominion by Great Britain over any part of Central America. This makes it proper for me to say that the English privileges, at the time of the conclusion of the Clayton-Bulwer treaty, in what has been known as the Belize, were confined to

a right to cut wood and establish saw-mills in a territory defined by metes and bounds. These privileges were conferred by treaties, in which Spanish sovereignty was recognized. On the successful revolution, the rights of Spain vested in the new Republics, and had not been materially changed when the Clayton-Bulwer treaty was concluded. That treaty was concluded April 19, and its ratification advised by the Senate May 22, 1850. On the exchange of the ratifications, Sir Henry Bulwer filed in this Department, under date of June 29, 1850, a declaration that the exchange was made with the understanding on the part of Her Majesty's Government that the treaty did not apply to her Majesty's *settlement* at Honduras and its dependencies. Mr. Clayton answered, under date of July 4, 1850, that he so understood, but that he must not be understood to either affirm or deny British title therein. It is to be observed that each of these declarations was made after the conclusion of the treaty by the joint action of the President and the Senate, and that the declaration was not made to or accepted by them. In 1859, Great Britain entered into a treaty with Guatemala, in which what had been called the *settlement* in the declaration made on the exchange of the ratification of the Clayton-Bulwer treaty was styled 'Her Britannic Majesty's settlement and possessions.'

"In the treaty with Guatemala the boundaries were defined, and it was agreed that all on one side of the defined boundaries 'belongs to Her Britannic Majesty.' It is further understood that when the commissioners met to mark the boundary in accordance with the agreement, it was found that the subjects of Great Britain had occupied so much more of Guatemala than was supposed that the commissioner on the part of Her Majesty's Government refused to proceed, and this large area of land has since remained practically in the possession of Great Britain.

"The United States have never given their assent to this conversion of the British 'settlement' in Central America under Spanish-American sovereignty into a British 'possession' with British sovereignty. There is a vast difference between a settlement subject to the sovereignty of the Central American Republic and a colony controlled by Great Britain.

"Under the treaty of 1850, while it is binding, the United States have not the right to exercise dominion over or to colonize one foot of territory in Central America. Great Britain is under the same rigid restriction. And if Great Britain has violated and continues to violate that provision, the treaty is, of course, voidable at the pleasure of the United States.

"Again, it is well known that the parties to the Clayton-Bulwer treaty anticipated that a canal by the Nicaragua route was to be at once commenced. Under the assumption of a protectorate of Mosquito, British authority was at that time in actual and visible occupation of one end of the Nicaragua route, whether with or without title

is not now material, and it was intended by this treaty to dispossess Great Britain of this occupation. This object was accomplished in 1859 and 1860 by treaties between Great Britain, Guatemala, Honduras, and Nicaragua, referred to in Lord Granville's dispatch of January 14, 1882. It was to this adjustment, which was one of the prime objects of the treaty, and not to the colonization of British Honduras that Mr. Buchanan in his message of December 3, 1860, alludes as 'an amicable and honorable adjustment of dangerous questions arising from the Clayton-Bulwer treaty.'

"When the Clayton-Bulwer treaty was concluded it was contemplated that the Nicaragua Canal, to which the treaty principally had relation, would be at once commenced and finished with all possible speed by American and British capital under the impulse of the joint protectorate. This appears not only from the context of the treaty, but also from the history of the negotiations which led to the treaty, and the relations which then existed between this Government and the Central American States.

"On December 12, 1846, New Granada, by a treaty of commerce, in consideration of certain guarantees, made the United States valuable grants relating to the Panama route, to which your attention will be directed when we consider the rights of this Republic in relation to the Panama route.

"The discovery of gold in California soon made it important to find some rapid way of reaching it. Notwithstanding the progress of the Panama Railroad scheme, public feeling was running strongly in favor of a ship-canal large enough to accommodate ocean steamships. Influenced by this strong feeling the minister of the United States in Nicaragua, without instructions, negotiated a treaty with that Republic, which conferred upon certain citizens of the United States the valuable right to construct a ship-canal from San Juan on the Atlantic coast to the Pacific. Nicaragua claimed sovereignty over the whole of the line of the proposed canal, while Great Britain, as I have shown, claimed sovereignty over a portion of it occupied by the Mosquito Indians.

"At the time of the concession by Nicaragua it would have been impossible to procure in the United States the capital necessary for the construction of a ship-canal from the Atlantic to the Pacific.

"Hence it was that when Mr. Clayton learned of the concession, he at once informed Mr. Crampton, the British minister, saying that the United States did not propose to avail themselves exclusively of these privileges, but wished a canal constructed, and that the claim of Great Britain on behalf of the Mosquito Indians, which the United States could not admit, stood in the way. The Government of the United States, Mr. Clayton said, was persuaded that 'these considerations, if fairly laid before Her Majesty's Government, would induce Her Majesty's Government to make such an arrangement with regard to

the Mosquito Indians as would prevent its being an obstacle to the design in question.'

"President Taylor was present at the interview, and 'cordially concurred.' Mr. Crampton reported the conversation to Lord Palmerston the 1st October, and on the 15th of the same month transmitted to him a copy of the concession by Nicaragua to the American company. The 22d November Mr. Abbott Lawrence officially informed Lord Palmerston that an American company, aided by the subscription of a large amount of British capital, had begun to construct the Panama Railroad, and had completed the contracts for iron for it. He transmitted to Lord Palmerston a copy of the guarantee in the treaty of 1846 with New Granada, and invited Great Britain to join in the guarantee. In the same note he acquainted her Majesty's Government with the concession from Nicaragua to the American canal company, and said that the conflicting claims as to Mosquito threw an obstacle in the way of the work, and invited a conversation on the subject. It seems that several conversations were had, since on the 14th of the following December Mr. Lawrence addressed a formal note to Lord Palmerston, in which, after referring to them and again setting forth the concessions for the Panama Railroad and the Nicaragua Canal, and stating that the United States had 'disclaimed all intention to settle, annex, colonize, or fortify the territory of Central America, which declaration had been met by a similar disclaimer on the part of Great Britain,' and also that Her Majesty's Government 'had intimated their willingness to join with the United States in their guarantee of neutrality,' he asked, in substance, 1st. Whether Great Britain would enter into a treaty with Nicaragua similar to that negotiated by the United States? 2d. Whether Great Britain would enter into a treaty with New Granada guaranteeing the neutrality of the railway then under construction? 3d. Whether the obstruction of the Mosquito protectorate would be removed? This note was never answered formally in London, but negotiations were transferred to Washington.

"Meantime, and in the autumn of 1849, Sir Henry Bulwer had succeeded Mr. Crampton in Washington, and, soon after his arrival, commenced negotiations with Mr. Clayton for a treaty for the protection of a canal.

"On the 6th of January, 1850, Sir Henry Bulwer wrote to Lord Palmerston, saying:

"'Your lordship is aware that the main interest of the United States in this matter has arisen from its newly acquired possession in the Pacific, and the project of an American company to form a water communication between the two oceans, passing through the lake of Nicaragua and the river San Juan; this company having obtained from the State of Nicaragua the use of its lakes and territory for this purpose, and the use also of the river San Juan, to which Nicaragua lays claim. * * * But it so happens that while it is very difficult, not to say impossible,

for Her Majesty's Government to listen to those claims of Nicaragua, our decision with respect to which has been already openly taken, there is no difficulty, I believe, whatsoever in her Majesty's Government assisting the United States in its general views with respect to that water communication across Central America, which Great Britain must be almost as desirous as the United States to see established. * * * I am disposed to think that the best way of doing this is by a convention between Great Britain and the United States.'

"Negotiations conducted on this basis progressed so rapidly that on the 3d February, 1850, Sir Henry Bulwer was able to transmit for Lord Palmerston's criticism the full project of a treaty. * * *

"The Clayton-Bulwer treaty was concluded on the 19th of the following April, and I think it will not be denied that the object which President Taylor, Mr. Clayton, Sir Henry Bulwer, and Lord Palmerston had in view in making it was primarily and mainly this: To insure at the earliest possible moment the completion of the particular ship-canal for which a concession had been made by Nicaragua to citizens of the United States on the 29th August, 1849; all the interviews of which accounts remain and all the correspondence relate to this particular canal and to no other. As if to make assurance doubly sure, the project of a treaty which Sir Henry Bulwer sent to Lord Palmerston the 3d of February, being found doubtful or insufficient in this respect, was so amended between that time and the 19th April as to make it practically certain that that grant would be accepted by both Governments as the one covered by the treaty.

"It was to this particular canal that were to be applied all the provisions of the first article in the treaty relating to the fortification of the canal, the control over it, and exclusive advantage in it; of the second article, relating to blockade, detention or capture; of the third and fourth articles, relating to protection during construction and to free ports; of the fifth article, in regard to a guarantee of neutrality; of the sixth article, with regard to treaties with other States, and the use of the good offices of the high contracting parties; and of the seventh article, as already noticed; but if under the provision of the seventh article the claims of the holders of this particular concession should be set aside, then each Government reserved to itself the right to determine whether its interests required it to afford protection to the holders of any other concession.

"The two Governments did, however, subsequently come to a harmonious agreement with regard to the grant by Nicaragua, the one contemplated by the treaty. * * *

"It was also agreed in the treaty that the parties should invite other States to enter into similar stipulation, to the end that they might share in the 'honor and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated,' to wit, that by the Nicaragua route.

"It is to be observed that if other nations were to become parties to the enterprise it was only on the joint invitation of both the United States and Great Britain; but the President regards the provision as lapsed by the failure to construct the canal to which it referred, and by the fact, before stated, that experience has shown that no joint protectorate for any canal across the Isthmus is requisite. The canal, however, now in question is on the Panama and not on the Nicaragua route.

"The remaining subject of the treaty is contained in the eighth article, which relates to a canal or railway across the Isthmus other than by the Nicaragua route, as by way of Tehuantepec or Panama, and it is this provision of the treaty which has occasioned this correspondence. The article provides as follows:

"'The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a *particular object* [to wit, the Nicaragua Canal, which, at the date of the treaty, it was thought was about to be constructed], but also to establish a general principle, they hereby agree to extend their protection, by *treaty stipulations*, to any other communications, whether by canal or railway, across the Isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama.'

"It is to be here observed that the Government of the United States has a treaty with New Granada, now a part of the United States of Colombia, entered into in 1846, by which free transit is guaranteed to the citizens of the United States across the Isthmus of Panama upon any mode of communication that may be constructed, subject to no duties or burdens but such as may be imposed upon citizens of New Granada; and by which, in order to secure the tranquil and constant enjoyment of these advantages, the United States guaranteed, positively and efficaciously, the *perfect neutrality of the Isthmus*, with the view that free transit from sea to sea might not be interrupted or embarrassed, and also guaranteed the rights of sovereignty and property which New Granada (now the United States of Colombia) had and possesses over said territory.

"By this treaty with New Granada the United States claim to occupy a peculiar relation to the means of transit by railroad or canal across the Isthmus, within the territories of the United States of Colombia, a relation which cannot justly be superseded by the intervention of other states without the consent of the United States, duly and properly obtained. A protectorate of this kind is, like government, necessarily exclusive in its character, and implies a right and duty to make it effective. There may be a joint protectorate engaged in by mutual convention of different states, but the protectorate itself must be a unit. The treaty with New Granada of 1846 still remains in full force. If Great Britain should desire to be united with the Government of the

United States in that guarantee, of course it would require the consent of the United States of Colombia and of this Government, and a convention to that end, the terms of which should be made agreeable to the parties.

"Article VIII of the Clayton-Bulwer treaty relates only to those projects *now* [1850] proposed to be established; and expressly contemplates some further 'treaty stipulation' on the part of Great Britain with the United States of America and New Granada, now the United States of Colombia, before Great Britain can join the United States in the protectorate of the canal or railway by the Panama route. No such treaty stipulation has been made or has been proposed by Great Britain. Since the ratification of the Clayton-Bulwer treaty, for thirty years the United States, under the treaty of 1846 with New Granada, has extended protection to the transit from sea to sea by the Panama Railway.

"Should Her Majesty's Government, after obtaining the consent thereto of the United States of Colombia, claim, under the Clayton-Bulwer treaty, the right to join the United States in the protection of the existing Panama Railway, or any future Panama canal, the United States would submit that experience has shown that no such joint protectorate is requisite; that the Clayton-Bulwer treaty is subject to the provisions of the treaty of 1846 with New Granada, while it exists, which treaty obliges the United States to afford, and secures to it the sole protectorate of any transit by the Panama route; and if Great Britain still claimed the right to join in the protectorate the United States would then determine whether the 'treaty stipulations' proposed by Great Britain regulating that joint protectorate were just; and, if so, whether the length of time during which Great Britain has concurred in the protection of the Panama route under the treaty with New Granada has or has not relieved the United States from any obligation to accept a proposal from that Government to join in the guarantee.

"I may then state the President's views on the whole subject, which I do with an assurance that they will meet with a candid consideration from Lord Granville, and with the hope that they may be substantially concurred in by Her Majesty's Government.

"The Clayton-Bulwer treaty was concluded to secure a thing which did not exist, and which now never can exist. It was to secure the construction of a canal under the grant of 1849 from Nicaragua that the United States consented to waive the exclusive and valuable rights which have been given to them; that they consented to agree with Great Britain that they would not occupy, fortify, colonize, or assume dominion over any part of Central America; and that they consented to admit Her Majesty's Government at some future day to a share in the protection which they have exercised over the Isthmus of Panama.

"The Government and people of the United States, though rich in land and industry, were poor in money and floating capital in 1850. The scheme for a canal, even without the complications of the Mosquito

protectorate, was too vast for the means of the Americans of that day, who numbered then considerably less than one-half of their numbers to-day. They went to England, which had what they had not, surrendered their exclusive privileges, offered an equal share of all they had in those regions in order, as expressed in the seventh article of the treaty, 'that no time should be unnecessarily lost in commencing and constructing the said canal.' Through no fault of theirs time was unnecessarily lost, the work was never begun, and the concession failed.

"The President does not think that the United States are called upon by any principle of equity to revive those provisions of the Clayton Bulwer treaty which were especially applicable to the concession of August, 1849, and apply them to any other concession which has been since or may hereafter be made. The conditions of 1882 are not those of 1852. The people of the United States have now abundance of surplus capital for such enterprises, and have no need to call upon foreign capitalists. The legislative branch of the Government of the United States may also desire to be free to place the credit of the United States at the service of one or more of these enterprises. The President does not feel himself warranted in making any engagement or any admission respecting the extinct provisions of the Clayton-Bulwer treaty which would prevent or interfere with such a purpose. On the contrary, frankness requires him to say that as the persons who held the grant which the United States understood to be accepted by the two Governments under the provisions of the treaty have not 'carried out the proposed enterprise,' the United States esteem themselves competent to refuse to afford their protection jointly with Great Britain to any other persons or company, and hold themselves free hereafter to protect any interoceanic communication in which they or their citizens may become interested in such way as treaties with the local sovereign powers may warrant and their interests may require.

"There are some provisions of the treaty which the President thought might be advantageously retained. With this purpose the present correspondence was opened by the note to you of the 19th November last, in which these points were indicated. The President is still ready on the part of the United States to agree that the reciprocal engagements respecting the acquisition of territory in Central America, and respecting the establishment of a free port at each end of whatever canal may be constructed, shall continue in force, and to define by agreement the distance from either end of the canal where captures may be made by a belligerent in time of war, and with this definition thus made to keep alive the second article of the treaty. He hopes that Lord Granville on further consideration may not be averse to revising his opinion that such agreements would not be beneficial.

"To the suggestion made by Lord Granville, at the close of this note of January 7, that the United States should take the initiative in an invitation to other powers to participate in an agreement based upon

the convention of 1850, the President is constrained, by the considerations already presented, to say that the United States cannot take part in extending such an invitation, and to state with entire frankness, that the United States would look with disfavor upon an attempt at a concert of political action by other powers in that direction.

"It is not necessary to observe that there is no provision of the Clayton-Bulwer treaty which authorizes Great Britain to invite, or obliges the United States to accept, the aid of other nations to protect or to guarantee the neutrality of the Panama route.

"Fortunately the want of harmony in the views of the two Governments can have at present no injurious influence. No canal yet exists across the Isthmus, and in the natural course of events some time must elapse before one can be constructed; meauwhile the points of divergence between Her Majesty's Government and that of the United States may disappear. The President hopes that long before the subject becomes one of practical importance Her Majesty's Government may be brought to see that the interests of Great Britain and of the United States in this matter are identical, and are best promoted by the peaceful policy which he has marked out for this country.

"In the mean time the diversity of opinion which now exists will not in any wise impair the good understanding happily existing between the people and Governments of the United States and Great Britain.

"You will read this dispatch to Lord Granville, and if he desires to have a copy of it you may leave one with him."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, May 8, 1882. MSS. Inst., Gr. Brit.; For. Rel., 1882.

"I inclose herewith copy of an instruction from Lord Granville to Her Britannic Majesty's minister in Washington, dated December 30, 1882, a copy of which was handed to me by Mr. West, and which is a reply to the agreement contained in my No. 368 to you, of May 8, 1882, on the subject of the Clayton-Bulwer treaty.

"You will remember that my No. 368 showed that the first seven articles of the treaty related to a particular canal then in contemplation, to aid the construction of which the treaty was signed; that the United States being then without the means to build the canal, for which they had secured an exclusive grant from Nicaragua, naturally turned to England for capital, to secure which they were willing to surrender some of their exclusive privileges; and that the canal never having been built, the reason for the surrender of privilege has ceased and the treaty with Great Britain is voidable, being without consideration or any object to which it is applicable.

"Lord Granville in his instruction to Mr. West in substance concedes that the first seven articles of the treaty related to what was then known as the Nicaragua Canal, but intimates an uncertainty as to the route.

In this he is in error, for the line of the canal was definitely fixed soon after the conclusion of the treaty, and accepted by both Governments.

"His lordship, however, practically confines himself to an assertion of rights under Article VIII, by which the parties, 'after declaring that they not only desired in entering into the convention to accomplish a particular object, but also to establish a general principle, agreed to extend their protection by treaty stipulations to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are *now* proposed to be established by the way of Tehuantepec or Panama.'

"And he claims that this provision is in effect an agreement that all the prior provisions with reference to the particular ship-canal—the Nicaragua route—then in contemplation should be applied to any other canal thereafter constructed. Citing treaties between the United States and some of the Central American States, he contends that this Government, having since the Clayton-Bulwer treaty of 1850 entered into treaties which harmonize with the 'general principle,' is estopped from denying that the 8th article has the construction and effect he contends for.

"Lord Granville further holds that Article VIII is none the less an agreement because it provides for further treaty stipulations to carry it into effect.

"This argument has already been anticipated in my No. 368, in which it was shown that while the parties interested agreed, in Article VIII, to extend, by future treaty stipulations, their protection over other communications across the Isthmus, the immediate object of the article was the protection of the communication '*now*' (1850) proposed to be established by the way of Tehuantepec or Panama. None of the proposed communications having been established, the reason for the agreement has disappeared.

"Further, the article provides for carrying out the 'general principle' by additional stipulations, which have not been even discussed. Nor is there anything in the eighth article which makes applicable to any other route the provisions of the first seven articles covering the 'particular object,' viz, the Nicaragua Canal.

"The eighth article, therefore, is simply a declaration of the intention entertained more than thirty years ago, by two nations, to take up, at some subsequent period, the negotiations of a treaty on a particular subject. In order to carry out this purpose, treaties must be made by the United States and England with each other and with each of the Central American States through which a canal may be built, defining in detail the stipulations necessary to execute the general principle.

"It cannot be successfully contended, as is suggested by Lord Granville, that the separate treaties made by this company with some of the

Central American States, by which this Government agrees to guarantee neutrality, show an agreement to guarantee it jointly with Great Britain, for that would involve the admission that an express agreement to guarantee singly is in effect an implied agreement to guarantee jointly. Nevertheless, it is not denied that the United States did for many years try to induce Great Britain to fulfill her part of the agreement of 1850, and it was only when it became impossible for Her Majesty's Government to perform the promises which had led the United States to make the treaty that the position now maintained was assumed.

"If it be contended that, even if the treaty may be considered as lapsed so far as it relates to the specific route by Nicaragua and the routes named in the eighth article as contemplated in 1850 (by Panama and Tehuantepec), yet the treaty is binding so far as it relates to other isthmian communication not specified and not then contemplated, the answer is that the treaty must be considered as a whole, and that the general stipulations of the eighth article would never have been made but for the stipulations as to the specified routes then contemplated, and that part of the treaty having lapsed, the general stipulation as to any interoceanic communication fails for want of consideration.

"To reach the construction his lordship seeks to put on the eighth article, its plain language must be disregarded, and the consideration must be ignored that the article is as applicable to the Panama Railroad as to any other means of isthmian transit, and that by acquiescence for many years in the sole protectorate of the United States over this railway, Great Britain has, in effect, admitted the justice of the position now maintained by the President.

"Passing the interpretation of Article VIII, you will remember that I contended that the Clayton-Bulwer treaty is voidable, because, while by Article I the two nations expressly stipulated that neither of them would occupy, colonize, or exercise any dominion over any part of Central America, Great Britain at this time has a colony, with executive and judicial officers, occupying a defined territory nearly equal in area to three of the smaller States in the Union.

"It is true, as was shown in my No. 368, that after the treaty had been ratified by the Senate in the form in which it now appears, and on the 4th July, 1850, Mr. Clayton did exchange with Sir Henry Bulwer memoranda stating that the stipulation in Article I should not apply to the '*settlements*' in British Honduras (Belize), and it is also true that Mr. Clayton declined to affirm or deny the British title in this 'settlement' or its alleged dependencies. Lord Granville now claims that Honduras was then already (and to the knowledge of this Government) a British 'possession' or colony, by conquest from Spain through successful resistance by settlers to a Spanish attack.

"The stipulations of the treaty, as well as the memoranda exchanged by Mr. Clayton and Sir Henry Bulwer, relative to a British settlement,

appear to be inconsistent with any such claim, for nowhere in them can be found any statement which expresses or implies that Great Britain claimed, or the United States admitted, any such Government control in the former over Belize as is now advanced, and as is necessarily implied in the word 'possessions.'

"The date of the conquest of Belize, alluded to by Lord Granville, is not stated, but the incident to which he refers is supposed to be the repulse by a ship of the royal navy and the settlers of an attempt in 1798 on the part of Spain to take possession of Honduras. As the British settlers held under grants from Spain, it seems hardly necessary to consider whether the successful resistance of a tenant to an attempt to oust by force changes the tenure to one of full possession. His lordship, however, meets this point by a plea of possession through abandonment, saying:

"'When peace was signed, most of the British conquests from Spain were restored to her; but the settlement in Honduras, like that of the Falkland Islands, was not given up, and continued on the same footing as any other possession under the British Crown.'

"By the third article of the treaty of Amiens, of 1802, Great Britain engaged to restore all Spanish possessions occupied or conquered by British forces. Belize was not given up because it was not a conquest, but a settlement under Spanish grants and Spanish sovereignty. The parallel with the Falkland Islands does not seem convincing, for these islands were ceded by France to Spain in 1763; by Spain they were in turn ceded absolutely to Great Britain in 1771, but their possession was abandoned until, in 1820, Buenos Ayres occupied the island as derelict, and colonized them. Later, in 1831, after a difficulty between the settlers and American sealing vessels, the United States ship of war Lexington broke up the settlement and removed the settlers to Buenos Ayres, and it was not until 1833 that Great Britain enforced her claim under the cession of 1771.

"As to Belize, however, there was no cession. If the sovereignty of Spain was annulled by conquest in 1798, it was restored by the treaty of Amiens in 1802; and while after this treaty and during the Bonaparte occupation hostilities were renewed, the treaty of 1809 provided that there should be peace between Spain and Great Britain, and 'also an entire obliteration of all hostilities committed during the late war.' Since the conclusion of this treaty Spain and Great Britain have been at peace, and it is not imagined that Earl Granville will seek to show that a lawful possession could be thereafter created for Great Britain by a violation of that treaty in time of peace. No conquest of any part of Honduras is known to have occurred after 1802, but if there were, the perpetuation of this conquest would hardly comport with the reciprocal engagement of 1809 to restore the *status quo ante bellum*.

"On the other hand, it is known that the settlements in the Belize were made under certain limited grants from Spain, subject to her sov-

ereignty, and that long after the treaty of 1809 the occupation was generally regarded simply as a 'settlement,' and was so called by Lord Clarendon as late as 1854, in a note to Mr. Buchanan, and so remained until May 12, 1862, when by royal commission it was erected into a full colony and subordinated to the Government of Jamaica.

"If Great Britain has turned the 'settlement' maintained for the cutting of logwood and mahogany into an organized British colony, and this is admitted, or if that settlement has encroached beyond the line occupied by the settlers in 1850, and the reports from Guatemala and Mexico tend to show that this has been done, the action has been taken in contravention of the Clayton-Bulwer treaty and in violation of one of its most important provisions. The insufficiency of this part of Lord Granville's argument is shown by the contention that through a postal convention this Government has recognized the British position. The negotiation of a postal convention in 1869 cannot be held to involve any admission of the political status of the Belize district. It is a strained construction of such an agreement to hold that it works an estoppel as to a matter not in the mind of either party to the negotiation, and as to which both parties were endeavoring to reach a satisfactory conclusion through other and different channels; nor does the Post-Office Department act politically in its dealings with similar departments of other Governments.

"If, however, the United States had submitted to the conversion of the Belize to a colony by Her Majesty's Government, in violation of the treaty, that is by no means a recognition of the binding force of the treaty on the United States when thus violated.

"In the conviction, therefore, that the arguments heretofore presented by the United States remain unshaken, the President adheres to the views set forth in the instruction to you of May 8, 1882.

"Lord Granville concludes by saying in effect that he does not answer that part of the instruction to you which relates to the Monroe doctrine, because of my observation that it is not necessary for Her Majesty's Government to admit or to deny that doctrine. As his lordship placed the claim of Her Majesty's Government on the continued binding force of the Clayton-Bulwer treaty, limiting that doctrine as we contend, I think my remark was logical, and so far as the United States are concerned, their views on that doctrine are sufficiently manifest.

"You will assure Lord Granville that this Government shares the sincere desire of that of Her Majesty to arrive at that amicable adjustment of the question which cannot fail to promote harmony and good will between the two countries, and which it is my duty and pleasure equally with his lordship to do all in my power to perpetuate and increase."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, May 5, 1883. MSS. Inst., Gr. Brit.; For. Rel., 1883.

"I inclose herewith a copy of an instruction from Lord Granville to Her Britannic Majesty's minister in Washington, dated August 17, 1883, a copy of which was handed me by Mr. West, and which is in reply to my 586 to you of May 5, 1883, on the subject of the Clayton-Bulwer treaty.

"You will observe that Lord Granville says:

"'That Mr. Frelinghuysen still contends that the Clayton-Bulwer treaty is voidable on two grounds—first, because the first seven articles of the treaty related to a *particular* canal by the Nicaraguan route only; and, secondly, because Great Britain has at the present day a colony instead of a settlement at Belize.'

"Lord Granville's attention should be called to the fact that this Government not only holds the position to which he has referred, but also holds, as stated to you in my instructions of May 8, 1882, and May 5, 1883, that for the purpose of obtaining the then needed capital to construct an interoceanic canal by the Nicaraguan route the United States were willing to surrender a part of their exclusive privileges in a canal by that route, and were also willing to agree that, by subsequent treaty stipulation, they would join with Great Britain in the protection of the then proposed Tehuantepec, Panama, or other interoceanic communication, and that the consideration having failed the treaty is voidable as to the Nicaraguan route and as to the other routes.

"Lord Granville raises the point that 'no time was fixed by the convention within which such interoceanic communications were to be made.' While this statement is correct, it is also true that it was contemplated that the canal was about to be constructed at the time the treaty was negotiated, and that the survey therefor was then made, and that thirty-three years have elapsed without Great Britain rendering the consideration on which the treaty was based, and this failure, we think, affects the treaty in the same manner that a failure by Great Britain to give the consideration within a definite time, had one been fixed by the convention, would have affected it.

"The treaty provides that neither the United States nor Great Britain shall colonize or exercise any dominion over any part of Central America. This was a most important provision. It is one of a cluster restraining one nation from having any advantage over the other in regard to the police of the canal, such as the provision against alliance, against occupation and fortification, and against taking advantage of any intimacy or influence, and yet it is claimed that the treaty does not prohibit the existence of a large regularly organized British colony in Central America, while it does prohibit the United States from having any possession or colony there. The color for this claim is that while the stipulation that neither of the two Governments should colonize any part of Central America is most conspicuous, the declaration of Sir Henry Bulwer, prior to the exchange of ratifications of the treaty,

states, 'That Her Majesty does not understand the engagements of that convention to apply to Her Majesty's settlement at Honduras or its dependencies.' This declaration cannot be held to authorize the subsequent colonization by Her Majesty's Government of a territory as large as three of our smaller States. The declaration was made not to change or vary the treaty, but out of abundant caution that it might not be misunderstood. The meaning of the declaration, we think, is that a mere settlement of British subjects for the purpose of cutting mahogany and logwood in Honduras under Spanish-American sovereignty was not to be considered a British colony and thus be a violation of the treaty, and I fail to see how, since the exchange of the ratifications of the treaty, the organization of a colony, with a full colonial government under the British sovereignty, can be looked upon as authorized or allowed, either by the treaty or by Sir Henry Bulwer's declaration.

"The two contracting powers were equally bound not to colonize any part of Central America, and the declaration itself of Sir Henry Bulwer, not being the exception of any territory in Central America from the operation of the treaty, but providing in effect that the settlement should not be considered a British colony, tended to strengthen and not to destroy the mutual obligation not to colonize in Central America.

"Lord Granville is correct in saying that I stated in my instruction to you of May 8, 1882, that Her Majesty's Government was not called upon either to admit or deny the views therein expressed as to the Monroe doctrine, and this was so for the reason there given, to wit, because Her Majesty's Government placed its claim to join in the protection of the interoceanic canal on a treaty which, if binding, certainly modified the Monroe doctrine, but the fact that this Government for a promised consideration modified by treaty what is called the Monroe doctrine, I think, does not in any manner affect that doctrine after the treaty has fallen, because of its infraction and because of the failure of the consideration contemplated."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, Nov. 22, 1883. MSS. Inst., Gr. Brit.; For. Rel., 1883.

Distinctive questions as to the Isthmus are discussed *infra*, §§ 287 *ff;* see also *supra*, § 57.

"The Clayton-Bulwer treaty was voidable at the option of the United States. This, I think, has been demonstrated fully on two grounds. First, that the consideration of the treaty having failed, its object never having been accomplished, the United States did not receive that for which they covenanted; and, second, that Great Britain has persistently violated her agreement not to colonize the Central American coast."

Mr. Frelinghuysen, Sec. of State, to Mr. Hall, July 19, 1884. MSS. Inst., Cent. Am.

A report in favor of abrogation of the Clayton-Bulwer treaty was made in the House on April 16, 1880. (House Rep. 1121, 46th Cong., 2d sess.)

Documents relating to the correspondence of the United States with Central America in 1849-'51, will be found in the Brit. and For. St. Pap. for 1850-'51, vol. 40, 953. These documents are as follows:

Mr. Crampton (Washington) to Lord Palmerston, Sept. 17, 1849, giving conversation with Mr. Clayton, Sec. of State, as to the latter's views in respect to the Hise treaty with Nicaragua, and as to Isthmus transit.

Mr. Crampton to Lord Palmerston, Oct. 1, 1849, giving further conversations with Mr. Clayton.

Mr. Abbott Lawrence (American minister at London) to Lord Palmerston, Nov. 8, 1849, inquiring as to the attitude of Great Britain as to joint guarantee of Isthmus transit.

Lord Palmerston to Mr. Crampton, Nov. 9, 1849, Nov. 13, 1849, inviting further discussion.

Lord Palmerston to Mr. Lawrence, Nov. 13, 1849, Nov. 19, 1849, as to further discussion, and as to the Squier treaty with Nicaragua, which Lord Palmerston held would, in its provision as to Greytown, "involve the United States in an unprovoked aggression towards Great Britain."

Article XXXV in a treaty between the United States and New Granada, signed at Bogota, Dec. 12, 1846.

Special convention between the United States and Nicaragua and Guatemala, June 21, 1849. (Hise treaty.)

Extract from the proposed treaty between the United States and Nicaragua, relating to the proposed canal, Sept. 3, 1849.

Contract between Nicaragua and the Canal Company, signed at Leon, Aug. 27, 1849.

Mr. Lawrence to Lord Palmerston, Nov. 22, 1849, Dec. 15, 1849, as to future negotiations.

Sir H. Bulwer to Lord Palmerston, Washington, Jan. 6, 1850, as to future negotiations.

Mr. Lawrence to Lord Palmerston, Jan. 30, 1850, as to provisional cession, on Sept. 28, 1850, of Tigre Island to the United States, and the seizure of the island on Oct. 16, 1850, by British forces, including instrument of cession, and decree of Oct. 9, 1849, granting cession; also correspondence in October and November, 1849, between Messrs. Squier and Chatfield as to contested possession of Tigre, Island.

Lord Palmerston to Mr. Lawrence, Feb. 13, 1850, announcing evacuation of Tigre Island, and stating "that Her Majesty's Government do not intend to occupy or colonize Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America."

Sir H. Bulwer to Lord Palmerston, Feb. 3, 1850, as to protectorate of Mosquito country and other matters in Central America.

Project of convention between Sir H. Bulwer and Mr. Clayton, and letter regarding the negotiation thereof.

President's message on the Nicaragua question, Feb. 13, 1850, and action of Senate thereon.

Correspondence between Sir H. Bulwer and Lord Palmerston as to negotiations between Feb. 18, 1850, and Sept. 25, 1851. Criticism on Squier's treaty with Nicaragua.

Treaty of United States with Nicaragua of Sept. 3, 1849.

Lord Palmerston to Sir H. Bulwer, Oct. 28, 1850, further criticising the above treaty.

Sir H. Bulwer to Lord Palmerston, May 19, 1851, making suggestions as to Greytown and Mosquito country.

Same to same, July 28, 1851, as to conversations with Mr. Webster relative to Greytown and Nicaragua; further correspondence relative thereto.

Mr. Lawrence to Lord Palmerston, Dec. 19, 1851, as to "outrage on U. S. steamship Prometheus," by British brig-of-war Express. Account by Captain Churchill thereof, Nov. 21, 1851.

Lord Granville to Mr. Lawrence, Dec. 30, 1851, disavowing action of Express.

The following documents are among our Congressional records:

Instructions to Minister Lowell. President's message, Dec. 15, 1881, S. Ex. Doc. 16, 47th Cong, 1st sess.

Mr. Lowell's dispatch on instructions. President's message, Jan. 27, 1882, S. Ex. Doc. 78, 47th Cong., 1st sess.

Earl Granville's reply. President's message, Feb. 17, 1882, S. Ex. Doc. 78, part 2, 47th Cong., 1st sess.

Further answer to Senate resolution. Report of Mr. Frelinghuysen, Sec. of State, in regard to the modification of. President's message, June 6, 1882, S. Ex. Doc. 78, part 3, 47th Cong., 1st sess.

Monroe doctrine and the Clayton-Bulwer treaty. Papers and correspondence giving a historical review of the relations between Great Britain and the United States with respect to Central America, and the construction of communications between the Atlantic and Pacific Oceans. President's message, July 29, 1882, S. Ex. Doc. 194, 47th Cong., 1st sess.

Report of Mr. Frelinghuysen, Sec. of State, transmitting correspondence not heretofore communicated. President's message, Dec. 19, 1883, S. Ex. Doc. 26, 48th Cong., 1st sess.

"This treaty (Clayton-Bulwer), after having been ratified by the Senate, upon its *language*, and not upon the *understanding* of the negotiators, was sent to England for the sanction of the Government; and there, circumstances show, that apprehension was excited lest the Honduras settlement should be embraced within the limits of the region over which it extended. To prevent this it was returned with a *quasi* ratification, or, rather, a declaration, that the settlement at Honduras and its dependencies was not subject to the 'engagements' of the treaty; and this declaration was received and reciprocated by the Secretary of State by a similar act, which the Senator from Delaware calls a counter declaration, but why, I confess my inability to discover, for it does not counteract the demand of the British minister, but assents to it by conceding that the 'engagements' of the treaty do not apply to British Honduras and its dependencies. * * * Now, sir, what was the duty of the Executive when a treaty was thus returned with a declaration intended to control its operation by considerations exterior to the stipulations? Why, to send it again to the Senate, a constituent branch of the treaty-making power, for its consideration and action, and not undertake to restrict its application by the *understanding* of the negotiators, at the expense of the language of the convention, though one of these happened to be the Secretary of State, for this union of functions was but an accident, and what was done upon that occasion may be done upon any other, and the *understanding* of these agents of negotiation may become more important than the text of the instrument itself."

General Cass, speech in Senate, Jan., 1854, given in Cass's Life (by Smith), 756.

Under the Clayton-Bulwer treaty neither party has a lawful right of protectorship over the Indians of the Mosquito coast.

8 Op. 436, Cushing, 1853. See further, 1 Dallas's Letters from London, 11; 2 Phill. Int. Law (3d ed.), Pref., p. v; T. J. Lawrence's Essays on Int. Law, 89 *ff.*

"The acquisition of California, the easiest approaches to which, at that time, were through the various isthmus passages from Tehuantepec to Darien, raised new questions with Great Britain. It was supposed that the most practicable route for a ship-canal was through the State of Nicaragua, by way of the San Juan River and the lakes through which it passes. The eastern coast of Nicaragua was occupied by a tribe called the Mosquito Indians, and Lord Palmerston officially informed Abbott Lawrence, the American minister at London, on the 13th of November, 1849, that 'a close political connection had existed between the Crown of Great Britain and the State and territory of Mosquito for a period of about two centuries.' This connection was asserted to have been founded on an alleged submission by the Mosquito King to the governor of Jamaica. The investigations made under Lawrence's directions enabled the United States not only to deny that, by public law, Indians could transfer sovereignty in the manner alleged, but also to show by contemporary evidence that no such transfer had been made. He quoted Sir Hans Sloane's account of the matter: 'One King Jeremy came from the Mosquitoes (an Indian people near the provinces of *Nicaragua*, *Honduras*, and *Costa Rica*); he pretended to be a king there, and came from the others of his country to beg of the Duke of Albemarle, governor of Jamaica, his *protection*, and that he would send a governor thither with a power to war on the *Spaniards* and pirates. This he alleged to be due to his country from the Crown of *England*, who had in the reign of King *Charles I* submitted itself to him. The Duke of *Albemarle* did nothing in this matter.' And from another publication, reprinted in Churchill's Voyages, Lawrence was able to give an account of the original alleged submission in the time of Charles I: 'He, the King, says that his father, Oldman, King of the Mosquito men, was carried over to England soon after the conquest of Jamaica, and there received from his brother King a crown and commission, which the present old *Jeremy* still keeps safely by him, which is but a cocked hat and a ridiculous piece of writing that he should kindly use and release such straggling Englishmen as should choose to come that way, with plantains, fish, turtle, etc.'" (See *infra*, §§ 295 *ff*.)

Mr. J. C. B. Davis, Notes, &c.

The relation of the Clayton-Bulwer treaty to the Isthmus is discussed *infra*, §§ 287 *ff*.

The circumstances leading to the Clayton-Bulwer treaty were noticed at the beginning of this section, and it was there shown that, while the object on which the treaty was meant to operate (the ship-canal then projected over Nicaragua), never existed, the only portion of the treaty to which efficiency in calling for a joint isthmus protectorship by Great Britain and the United States could now be ascribed is the eighth article. It would be improper in this place to examine this claim so far as it relates to negotiations still in progress. But as to its relation to the general principles of international law as declared in other portions of this work, the following observations may be made:

1. Stipulations in treaties based on a particular state of facts become inoperative when these facts are so materially modified that these stipulations cannot be rightfully enforced. (*Supra*, § 137*a*.) By no power has this principle been more strictly enforced than by Great Britain. Her

guarantee in the treaty of Chaumont, in 1816, of the integrity of Holland, for instance, she held to be vacated in 1830, on the ground that Belgium could not be made to work peacefully in the Dutch yoke, which was in 1816 the very danger against which she guaranteed; nor has she hesitated from time to time to accept, if not to promote, other revolutionary changes which tore to tatters the settlement she united in guaranteeing on the fall of Napoleon. But the intermediate changes she appealed to as sustaining her repudiation of these treaties are far less material than the changes in America which, since the treaty of 1850, now before us, have left that treaty without an object to which, in the sense in which it was framed, it can rightfully apply. The Nicaragnan canal, which the treaty was passed to protect, has been given up; the concession from Nicaragua on which it was based has been recalled; and in its place has been constructed an interoceanic railroad, under the direction, as we will see, of citizens of the United States, under the sole guarantee of the United States, on tolls which open it without discrimination to all nationalities and on terms of liberality of which Great Britain has not hesitated freely to avail herself, without even an intimation, as will be more fully noticed hereafter, that the new system she has thus ratified is not regarded by her as taking the place of the inoperative system of joint guarantee proposed in the treaty of 1850. Nor is this all. In 1850 Great Britain and the United States controlled almost the whole commerce that sought a passage over the Isthmus. Now, Germany and France are pressing on the Isthmus shores as equal competitors. In 1850 the Pacific coast of the United States was an unorganized and almost unexplored waste. Now, on that magnificent territory, teeming as it has been proved to be with mineral wealth, and with a climate and soil which produce the most varied and abundant crops of fruit, of vegetables, and of grain, have since then sprung into existence a group of orderly States, each with an area far exceeding that of Great Britain, whose population, increasing with unparalleled rapidity, and instinct with business enterprise, calls each year the more earnestly and the more reasonably for a free exchange of its products with those of Europe. Nor is this all. The principle of interoceanic transit under single sovereignties has since 1850 been recognized by both Great Britain and the United States in the establishment of transcontinental railways, one of which, that through Canada, is dependent in part on the comity of the United States for expedition on its route. But a still more important fact is the non-joinder of other States in the guarantee of "neutrality" provided for by the treaty of 1850. No "neutrality," viewing the term in the sense of "neutralization," goes into effect until, as we will presently more fully see, it is acceded to by the powers capable of waging civilized war. To the treaty of 1850 there has been no such accession. Hence this treaty, so far as concerns this particular stipulation, has ceased to exist; and to Great Britain this conclusion is peculiarly applicable, since Great Britain, while advancing this claim to protectorship, has not taken a single step to procure for the treaty that adhesion of other powers by which alone, as a treaty for neutralization, as will be hereafter seen, could it be made effective. And it is to be observed, also, as to the eighth article of the treaty of 1850, which is the only part of it which is now appealed to as providing for a joint protectorate, that it is not a treaty stipulation for the present, but a stipulation to make a treaty in the future. It is therefore only a promise to make a promise, and like all other promises to make promises, it refers to the discretion of the future

that which is not at the present determined. And to such a treaty to make a treaty in the future, without limit as to time, applies peculiarly that argument against perpetuity in treaties so strongly put by Mr. J. S. Mill in a passage already quoted (*supra*, § 137*a*); nor can we do otherwise, in view of the little weight attached to such agreements in other cases, as well as of the circumstances of this particular case, than regard such engagements, as were the engagements of perpetuity and of endless self-continning alliance and guarantee which Great Britain introduced into the treaty of Chaumont and in the settlements of the congress of Vienna, as anything more than expressions of good will at the present and not as pledges of future action. And this conclusion, so far as it applies to attempts to impose by treaty perpetual obligations to readjust themselves in their original force to all future contingencies, is true from the nature of things, for, on mutable conditions, as is argued by Hooker, with a power of argument and wealth of illustration to which all condensations must fail to do justice, there can be no immutable polity imposed. And if this be so, as he maintained, with regard to Divine polity, it must, *a fortiori*, be so with human.

2. When stipulations are interdependent, a failure by one party to perform a condition imposed on him justifies a refusal by the other party to perform acts dependent on such condition being performed. In no case has this position been pushed to such an extreme as it was by Great Britain, when for ten years after the treaty of peace she refused to deliver up posts she held within the territory of the United States, and which were the centers round which Indians hostile to the United States were collected; her ground being that the payment of British creditors, which the treaty only bound the United States to recommend, had not been perfected. (See *supra*, §§ 150, 150*a*.) The agreement by the United States in the Clayton-Bulwer treaty to admit Great Britain to a joint protectorship of all future inter-oceanic routes, even were such an agreement valid, was conditioned on the entire withdrawal of Great Britain from the exercise of any other protectorship or dominion in Central America. That there was no such entire withdrawal, so far as concerns the Mosquito country, results, as will presently be seen, from the conditions of her treaty with Nicaragua. (As to the question of fact, see *infra*, §§ 295 *ff*.) So far as concerns the Belize (or British Honduras, as she calls it), she has since 1850, as we will see, converted a mere squatter "settlement," existing there by the sufferance of Honduras, into a British colony under the immediate direction of the British Crown. It is true that in so doing she appeals to a memorandum of Mr. Clayton, above quoted, giving his notion, after the treaty was ratified, of what the treaty meant. But Great Britain has already had occasion to acknowledge and act on the fact that under the Constitution of the United States, which is open before her, no stipulation in a treaty that is not sanctioned by the Senate binds the United States internationally (see *supra*, §§ 131, 131*a*), and she could just as rationally attempt to hold the United States to a treaty which never went to the Senate, which she has conceded she cannot do, as to hold the United States to a supplementary article to a treaty, such as Mr. Clayton's memorandum would be if it bound at all, when such supplementary article never went to the Senate. But in point of fact Mr. Clayton's memorandum was not a supplementary article. He was a good lawyer as well as a straightforward and loyal statesman, and he knew that Sir H. L. Bulwer knew that this memorandum was a mere personal opinion of his, which had no binding force. Had he thought otherwise, or had he thought that Sir H. L. Bulwer

thought otherwise, he would at once have sent the memorandum to the Senate for its action. But he did not, and the memorandum, made after the treaty was completed, and without the solemnization which both parties knew to be necessary to its validity as a supplement to the treaty, has no other force than is assignable to the opinion of a negotiator, understood by himself and his co-negotiator to have no binding power, uttered after the transaction is closed.

But even admitting that Mr. Clayton's statement gives, together with that of Sir H. L. Bulwer, an authoritative construction of the treaty, none the less conspicuous is the violation by Great Britain of the stipulation on her part not in future to acquire such possessions in Central America, or bordering thereon, as might add materially to her power over an interoceanic canal by which Central America should be traversed. The declaration of Sir H. L. Bulwer, as acceded to by Mr. Clayton, which is used to excuse the subsequent acquisition by Great Britain of the Belize, is "that Her Majesty's Government does not understand the engagements of that convention to apply to Her Majesty's settlement at Honduras or its dependencies." But, as Mr. Frelinghuysen justly says, in his instructions to Mr. Lowell, above cited, of November 22, 1883, "this declaration cannot be held to authorize the subsequent colonization by Her Majesty's Government of a territory as large as three of our smaller States;" as large, as previously put by Mr. Frelinghuysen, as Massachusetts, Connecticut, and Rhode Island. "The meaning of the declaration, we think," he goes on to say, "is that a mere settlement of British subjects for the purpose of cutting mahogany and logwood in Honduras under Spanish American sovereignty was not to be considered a British colony, and thus be a violation of the treaty; and I fail to see how, since the exchange of the ratifications of the treaty, the organization of a colony, with a full colonial government under the British sovereignty, can be looked upon as authorized or allowed, either by the treaty or by Sir Henry Bulwer's declaration. The two contracting parties were equally bound not to colonize any part of Central America, and the declaration itself of Sir Henry Bulwer, not being the exception of any territory in Central America from the operation of the treaty, but providing in effect that the settlement should not be considered a British colony, tended to strengthen and not to destroy the mutual obligation not to colonize in Central America." But not only are the terms of this treaty violated by Great Britain in thus extending her sovereignty over the Belize, but the object of the treaty is defeated by the acquisition in Honduras of a territory on which fortresses could be built to overawe the coast of the Isthmus, and harbors opened from which can issue cruisers which could control the mouth of any canal by which the Isthmus could be pierced. Nor do the statements of Mr. Marcy and Mr. Buchanan, as quoted above, affect this conclusion. What Mr. Marcy, in his instructions of December 30, 1853, spoke of as not affording ground for protest was the "qualified" and scrambling "settlement" by British lumbermen, under license from Honduras, of the Belize for the purpose of cutting and sawing mahogany; and the same may be said of Mr. Buchanan's memorandum of July 22, 1854. When Mr. Buchanan, also, in his last annual message, spoke of the British treaty of 1859 with Honduras, and the British treaty of 1860 with Nicaragua, as "satisfactory," he was unaware of two important facts which, had he known them, would have led him, instead of expressing satisfaction, to have renewed his old protest against British aggression in Central America. He did not know that Great Britain was then

organizing on the Belize, under a strained construction of the treaty of 1859, a British dependency under absolute British control, enabling Great Britain to dominate the Isthmus in the teeth of her abjuration of 1850. Nor did he know that, to use the words of Mr. Fish in his instructions of April 16, 1872, above quoted, the Nicaragua treaty "assigned boundaries to the Mosquito reservation probably beyond the limits which any member of that tribe had ever seen," nor that it "confirmed the grants [mostly to British settlers] previously made in Mosquito territory," thereby securing the permanent possession of that coast to British subjects.

3. Stipulations in a treaty may cease to be operative by surrender. (*Supra*, § 137*a*.) Aside from the implication of such surrender by Great Britain from her dropping all attempts to obtain, by the concurrence of other powers, an operative international neutralization of the Isthmus, we may infer such surrender, as has been already incidentally noticed, from Great Britain's non-application to take part in the guarantee of the Panama route. If she held the Clayton-Bulwer treaty authorized her to participate jointly in the guarantee and supervision of all isthmian routes, her zeal as well as her interest would have prompted her to claim this share in the guarantee and supervision of the Panama road; that she has never made this claim shows that either she did not construe the treaty as having such application, or that if she did, she abandoned the claim.

4. The assertion of such a claim could not now be made by Great Britain without infringing that well-established rule of equity that a party who permits, without protest, though with full notice, another party to go on for years and make investments in, and exercise dominion over, a particular piece of land, is estopped from setting up a conflicting title to such land of which title he was all the time cognizant. This, on a scale of enormous importance, is the case with Isthmus transit. Great Britain, so it is said, claims from the time of the treaty of 1850 a joint protectorship over such transit, on any line whatsoever. Yet, at the very time (1850) in which the treaty on which she bases this right was executed, there was in force a treaty between the United States and New Granada by which the United States, as an independent power, without even a suggestion of British co-operation, was to guarantee a railroad to form the instrument of interoceanic commerce then clamoring for such a transit (see *supra*, § 145). Of this Great Britain had full notice. She had full notice also from the very condition of things as they then existed, informed as she was by her numerous agents on the spot, and impelled by her vast interests at stake, that in 1850 the Panama Railroad was organized, and that it went into operation, under the management exclusively of citizens of the United States, in 1855. She has had this notice, and she not only has stood acquiescingly by while vast amounts of capital belonging to citizens of the United States have been invested in this road, but she has reaped the advantages of this outlay in the enjoyment of tolls the same as those imposed on all other customers of the transit it secures. During all this time she has uttered not one word of warning. She has not only stood silent while all these great treasures of energy and capital were poured into this road, never uttering one word to intimate that she contested the exclusive title under which alone these expenditures were or could have been made, but, without taking the risk or contributing to the outlay or enduring the burdens, has reaped the full benefits of the adventure. She cannot now lift her voice to contest the

title on which these expenditures were based; nor, to do her justice, has she made such a claim. Yet, not making such a claim as to the Panama Railroad, is equivalent to not making it to Isthmus transit as a whole. The very fact, as we have just seen, that at the time when a notice of interference from her would have stopped the building, under its then auspices, of the Panama road, she gave no such notice, shows that no claim to a joint protectorship of all such modes of transit was contemplated by her at a time when the circumstances of the execution of the treaty was fresh in her mind. And what she did not assert then, each additional year of toil and investment by citizens of the United States in the Panama Railroad, under her observation and to her benefit, but without her protest, has placed an additional barrier in the way of her asserting such adverse claim now. And to surrender the claim by implication as to one line of transit, surrenders it by implication as to all.

5. For Great Britain to assume in whole or in part the protectorate of the Isthmus or of an interoceanic canal, viewing the term protectorate in the sense in which she viewed it in respect to the Belize and the Mosquito country, would be to antagonize the Monroe doctrine (*supra*, § 57); and for the United States to unite with her in such a protectorship would be to connive at such an antagonism. The Clayton-Bulwer treaty, if it were to be construed so as to put the Isthmus under the joint protectorate of Great Britain and the United States, would not only conflict with the Monroe doctrine, by introducing a European power into the management of the affairs of this continent, but it would be a gross departure from those traditions, consecrated by the highest authorities to which we can appeal, by which we are forbidden to enter into "entangling alliances" with European powers. (*Supra*, §§ 45, 57, 72.) No "alliance" could be more "entangling" than one with Great Britain to control not merely the Isthmus but the interoceanic trade of this continent; no introduction of a foreign power could be more fatal to the policy of Mr. Monroe, by which America was to be precluded from being the theater of new European domination, than that which would give to Great Britain a joint control of the continent in one of its most vital interests. But this objection, it is important to understand, applies to "protectorship" by a great European power, not to "neutralization" by which the "neutrality" of the Isthmus is settled by all the great powers of the world. (See Professor Holland on the Suez Canal, Fortnightly Review, July, 1883.) To constitute "neutralization" in the sense in which we speak of the "neutralization" of Belgium and of Switzerland, or of the Dardanelles or of the Suez Canal (see *supra*, § 40), requires such general action. An edict of France, for instance, declaring Belgium "neutral," would bind only France; it required the joint action of the great European powers to make Belgium what she now is, a barrier between France and Germany, which neither can overpass without bringing on the offending party the speedy interference of the other guaranteeing powers. Such an international agreement, entered into by all the great powers, would not be in conflict with the Monroe doctrine in the sense above given. For an agreement that no powers whatever should be permitted to invade the neutrality of an Isthmus route, but that it should be absolutely neutralized so as to protect it from all foreign assailants by whom its freedom should be imperiled, is an application, not a contravention, of the Monroe doctrine. Such an agreement is not an approval of, but an exclusion of, foreign interposition.

6. It is not inconsistent with such an effective neutralization, established by the action of the great powers, that to the United States should be assigned a predominant influence in the management of the Lesseps canal, should that canal be put into operation. In Mr. T. J. Lawrence's essay on the "Means of neutralizing the Canal" (Essays, etc., by T. J. Lawrence, deputy professor of international law, Cambridge, 1884), it is said that if the position were taken "that the United States have grown so great since the treaty of 1850 was signed, and their interests in the canal are so superior to those of any other power, that they ought to have a preponderating voice in determining the rules to be adopted," "such a position would have been impregnable;" and this statement is none the less effective from the fact that Mr. Lawrence's work contains the ablest argument that has been published in behalf of the continuing operation of the treaty of 1850 on all present or future interoceanic routes. Nor could Great Britain take any other position. The Suez Canal, so Great Britain claims, is "neutralized;" yet she has assumed a predominant control over that canal, and this control has been acquiesced in by the other great powers interested.

Mr. D. L. Seymour's report of February 11, 1853, on reciprocal trade with British North America is found in House Rep. 4, 32d Cong., 2d sess. (See App., vol. iii, § 150*f*.)

As to reciprocity treaty of Jan. 28, 1854, see letter from Mr. Chase, Sec. of the Treasury, Jan. 28, 1864, House Ex. Doc. 32, 38th Cong., 1st sess. See also House Ex. Doc. 96, 36th Cong., 1st sess.; House Rep. 22, 37th Cong., 2d sess.

Under the reciprocity treaty between the United States and Great Britain of 1854 the President cannot issue his proclamation giving effect to the treaty as to Canada alone, in anticipation of the action of New Brunswick, Nova Scotia, and Prince Edward's Island, nor until he shall have received evidence, not only of the action of these provinces, but also of the Imperial Parliament.

6 Op., 748, Cushing, 1854.

The convention of 1854 for mutual reciprocity of trade with Canada, terminated by notice, did not operate to release a forfeiture previously incurred.

Pine Lumber, 4 Blatch., 182.

The draft of the treaty between Mr. Dallas and Lord Clarendon, of August 27, 1856, will be found in Brit. and For. St. Pap. for 1856–'57, vol. 47, 661.

(*h*) TREATY OF WASHINGTON (1871) AND GENEVA TRIBUNAL.

§ 150*g*.

The rules laid down by the treaty of Washington and applied by the Geneva tribunal are discussed in a future section, *infra*, § 402*a*.

The immediate preliminaries of this treaty are thus stated:

"Mr. Fish, when he became Secretary of State, hastened to say to Mr. Motley, the United States minister at London, that 'the President recognizes the right of every power, when a civil conflict has arisen within another state, and has attained a sufficient complexity, magnitude, and completeness, to define its own relations and those of its citizens and

subjects toward the parties to the conflict,' and that the President regarded the concession of the rights of belligerence to the insurgents 'as a part of the case only so far as it shows the beginning and animus of that course of conduct which resulted so disastrously to the United States.'

"Great Britain accepted this basis for the resumption of negotiations; and a treaty was signed on the 8th of May, 1871, for the reference to a tribunal of arbitration, to be convened at Geneva, of all the said claims growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama claims.' This tribunal was empowered to determine whether Great Britain had failed to fulfill any of its duties in respect to the subject of arbitration as set forth in the treaty; and in case it should so find, then it was further empowered to proceed to award a sum in gross to be paid to the United States for all the claims referred to it.

"On the organization of the tribunal at Geneva the United States preferred their claims, with a statement of the grounds on which indemnity was asked. * * *

"The views respecting the animus of Great Britain during the insurrection, which Mr. Fish had announced his purpose of presenting for the consideration of any tribunal which might be agreed upon to inquire into the subject, were elaborated and made the basis to support the whole claim for compensation. It was contended upon the other side, as will be seen by reference to the title '*Neutrals*,' that the tribunal should assume that Great Britain had exercised its powers, during the insurrection, with good faith and reasonable care, until the assumption should be 'displaced by proof to the contrary' presented on behalf of the United States.

"In the proceedings which followed, the United States demanded compensation for the following classes of losses and expenditures, so far as they grew out of the acts of the cruisers, viz: 1. 'Direct losses growing out of the destruction of vessels and their cargoes.' 2. 'The national expenditures in the pursuit of those cruisers.' 3. 'The loss in the transfer of the American Commercial Marine to the British flag.' 4. 'The enhanced payments of insurance.' 5. 'The prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the rebellion.' It was denied by Great Britain that a submission of all the claims to arbitration carried with it the right of the arbitrators to take into consideration all the elements of loss, and it was insisted that the tribunal had no right, under the terms of the treaty, to take classes three, four, and five into consideration in its estimate of damages. The United States denied this proposition, and contended that the tribunal was invested with power to decide the question of the extent of its jurisdiction. (See on this point *infra*, §§ 238, 329*a*.) The tribunal, without deciding the question, held that 'these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal, in making its award, even if there were no disagreement between the two Governments as to the competency of the tribunal to decide thereon.' And in regard to the second of the above items of loss, the tribunal, in its award, decided thus: 'Whereas, so far as relates to the particulars of the indemnity claimed by the

United States, the costs of pursuit of the Confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States: The tribunal is therefore of opinion, by a majority of three to two voices, that there is no ground for awarding to the United States any sum by way of indemnity under this head.' The tribunal awarded to the United States the sum of fifteen and one-half millions of dollars in full satisfaction of the claims referred to it.

"Under the same treaty a commission was organized at Washington to adjudicate upon private claims of citizens of each against the other power arising out of acts committed against the persons or property of their citizens during a period which was assumed to be the period of the existence of the insurrection. The language of the submission in the treaty was selected by the negotiators with the object of excluding from the consideration of the arbitrators a class of claims known as the Confederate cotton debt, which the Secretary of State informed the British minister that the United States would not consent to refer. Such claims were, however, presented before the commission by the British agent. The United States made political representations against this infraction of the treaty, and, pending a discussion upon it, the commissioners disposed of the question by deciding against the claims on their merits."

Mr. J. C. B. Davis, Notes, &c.; see *infra*, § 402*a*.

Under article 30 of the treaty of 1871 a British vessel may, in the course of a single voyage, ship goods at two or more successive United States ports on the lakes, for delivery partly through Canada by land in bond, at other United States ports; and then, after completing her cargo, sail to the Canada port where the land carriage is to begin.

14 Op., 310, Williams, 1873.

Under article 30 of the treaty of Washington, of 1871, and article 19 of the regulations made under the first-mentioned article to carry its provisions into execution, it is lawful to transport goods by means of British or American vessels from the ports of Chicago or Milwaukee to points in Canada, thence through Canadian territory by rail, and from the termini of the lines of railway by either British or American vessels to the ports of Oswego and Ogdensburgh, all the above named ports being "ports on the northern frontier of the United States," within the meaning of said regulations.

16 Op., 42, Devens, 1878.

"The provisions of the concluding paragraphs of the 11th article of the Universal Postal Convention of Paris reserve to the Government of each country of the postal union the right to refuse to carry over its territory, or to deliver articles in regard to which the laws, ordinances, or decrees, which regulate the conditions of their publication or of their circulation in that country have not been complied with." Hence a law

of the British Government, excluding certain classes of publications from Great Britain, is not inconsistent with that convention.

Mr. Blaine, Sec. of State, citing Mr. James, Postmaster-General, to Mr. Ford, June 18, 1881. MSS. Dom. Let.

For a review of the treaty of Washington and the Geneva arbitration, see 3 Phill. Int. Law (3 ed.), 251 *ff.*

(13) Hanseatic Republics.

§ 151.

Under article 9 of the treaty with the Hanseatic Republics of December 20, 1827, together with article 4 of the treaty with Belgium of 1858, steam vessels of Bremen, plying regularly between that port and the United States, have, during the entire period subsequent to the date of the ratification of said treaty with Belgium, been exempt from tonnage-tax in American ports, by force of article 9 of said treaty with the Hanseatic Republics and are entitled to a refund of any such tax which has been collected from such vessels in American ports at any time within that period.

14 Op., 530, Williams, 1875; see *Infra*, § 162.

(14) Hawaii.

§ 151*a*.

Questions concerning intervention in Hawaii are discussed, *supra*, § 62.

"In the year 1826 Thomas Ap Catesby Jones, commanding the United States sloop-of-war Peacock, signed articles of agreement in the form of a treaty with the King of the Hawaiian Islands. The Hawaiians professed to have observed this as a treaty, but it was not regarded as such by the United States.

"In December, 1842, the 'duly commissioned' representatives of King Kamehameha III proposed to Mr. Webster, Secretary of State, to conclude a treaty whenever the sovereignty of the King should be recognized. In support of their proposal they said, 'Twenty-three years ago the nation had no written language, and no character in which to write it. * * * The nation had no fixed form or regulations of government except as they were dictated by those who were in authority, or might by any means acquire power. * * * But under the fostering influence, patronage, and care of His Majesty, and that of his predecessors, the language has been reduced to visible and systematized form, and is now written by a large and respectable portion of the people. * * * A regular monarchical government has been organized of a limited and representative character. * * * A code of laws, both civil and criminal, has been enacted and published. * * * Their position is such that they constitute the great center of whale-fishery for most of the world. They are on the principal line of communication between the western continent of America and the eastern continent of Asia; and such are the prevailing winds on that ocean that all vessels requiring repairs or supplies, either of provisions or of water,

naturally touch at those islands, whether the vessels sail from Columbia River of the North, or from the far distant ports of Mexico, Central America, or Peru upon the south.'

"Mr. Webster replied, 'The United States have regarded the existing authorities in the Sandwich Islands as a Government suited to the condition of the people, and resting on their own choice, and the President is of opinion that the interests of all the commercial nations require that that Government should not be interfered with by foreign powers. * * * The President does not see any present necessity for the negotiation of a formal treaty.' It was not until 1849 that a treaty was concluded.

"Under this treaty it was held by Attorney-General Speed (June 26, 1866), that the consular courts at Honolulu have the power, without interference from local courts, to determine, as between citizens of the United States, who comprise the crew of an American vessel, and are bound to fulfill the obligations imposed by the shipping-article."

Mr. J. C. B. Davis, Notes, &c.

Mr. Fernando Wood's report on the bill to carry into effect the Hawaiian treaty of 1875 is given in House Rep. 116, 44th Cong., 1st sess.

(15) ITALY.

§ 152.

"By direction of your Government you make two points concerning that convention (of Feb. 8, 1868). The first you present in the following words: 'First, in Article XIII, line 2, by the word "officers" of a ship, the Italian Government presumes that you include the captain. You will please inform me if that is so.'

"I answer directly that I understand the word 'officers' of a ship to include the captain.

"In the second place you say, 'My Government supposes you would like to continue a common reciprocity in Italian ports not mentioned in the convention, which is, that your consuls be notified by the Italian authorities of certain visits they are sometimes compelled to make on board American merchant vessels. Hoping you will give the Federal authorities instructions to grant these reciprocal favors to Italian consuls, my Government will not fail to issue similar instructions to the proper authorities in Italy. In health visits to an arriving ship and in many other customary visits, where the consul's presence could be of no use such notice is not necessary.'

"In regard to this point, the visits which I understand you to mean are such visits as are made where the search of a merchant vessel, for fiscal purposes, is instituted by the local authorities in the ports of either party.

"It is in regard to these visits that you suggest that the consul of the nation whose flag the vessel bears shall be notified of the intended visit.

"I have the honor to say that the suggestion seems a very suitable one, and that the proper instructions will be given to the collectors of customs in the ports of the United States to comply with the request of the Italian Government, with the understanding that reciprocal proceedings will be adopted by that Government.

"With what may seem to you extreme caution I am to inform you that the assurances given in this letter are only assurances which this Department makes for itself, and cannot be taken as constituting a part of a consular treaty for modifying its provisions. * * *

"I have no hesitation in saying that the words 'infamous punishments' (*peines infamantes*) contained in paragraph 8, Article II, of the convention of March 23, 1868, are to be understood as applying to the reciprocal description of punishment for crimes prevailing in Italy just as it is expressed in the text of the Italian Code.

"This opinion of the Department, however, must not be understood as legally modifying the language of the convention."

Mr. Seward, Sec. of State, to Mr. Cerruti, Sept. 15, 1868. MSS. Notes. Italy. This opinion is virtually embodied in a treaty for this purpose proclaimed May 11, 1869.

Under the convention of 1868, a person may be surrendered for the crime of murder committed before the making of the convention.

In re Giacomo, 12 Blatch., 391.

The liability of the government of the Two Sicilies for the spoliations directed by Murat when King of Naples has been elsewhere incidentally noticed. See *supra*, §§ 5, 137; *infra*, §§ 236, 317. This liability was ineffectually pressed on the government of the Two Sicilies by Mr. Pinkney in 1816. The question remained open until the first session of the Twenty-first Congress, when President Jackson, in his opening message, said:

"Our demands upon the Government of the Two Sicilies are of a peculiar nature. The injuries on which they are founded are not denied, nor are the atrocity and perfidy under which those injuries were perpetrated attempted to be extenuated. The sole ground on which indemnity has been refused is the alleged illegality of the tenure by which the monarch who made the seizures held his crown. This defense, always unfounded in any principle of the law of nations, now universally abandoned, even by those powers upon whom the responsibility for acts of past rulers bore the most heavily, will unquestionably be given up by his Sicilian Majesty, whose counsels will receive an impulse from that high sense of honor and regard to justice which are said to characterize him; and I feel the fullest confidence that the talents of the citizen commissioned for that purpose will place before him the just claims of our injured citizens in such a light as will enable me, before your adjournment, to announce that they have been adjusted and secured."

The application under this final appeal was successful, and two years afterward the President informed Congress that the ratifications of a convention for the settlement of these claims had been duly exchanged. The act to carry this into effect was passed on the 2d of March, 1833. (See discussion detailed *infra*, § 236.)

"With the Papal States the United States maintained diplomatic relations for many years; but, in 1868, Congress neglected to make appropriations for the support of a mission, and the minister was withdrawn. In his annual message to Congress in 1871 President Grant said: 'I have been officially informed of the annexation of the States of the Church to the Kingdom of Italy, and the removal of the capital of that Kingdom to Rome. In conformity with the established policy of the United States, I have recognized this change.'"

Mr. J. C. B. Davis, Notes, &c. As to recognition of Papal authority, see *supra*, § 45.
As to Sicilian spoliations, see *infra*, §§ 228, 236.

(16) JAPAN.

§ 153.

"Mr. Edmund Roberts, a sea captain of Portsmouth, N. H., was named by President Jackson his 'agent for the purpose of examining in the Indian Ocean the means of extending the commerce of the United States by commercial arrangements with the powers whose dominions border on those seas.' He was ordered on the 27th of January, 1832, to 'embark on board of the United States sloop-of-war the Peacock,' in which he was to 'be rated as captain's clerk.' On the 23d of the following July he was told to 'be very careful in obtaining information respecting Japan, the means of opening a communication with it, and the * * * value of its trade with the Dutch and Chinese,' and that when he should arrive at Canton he would probably receive further instructions. He had with him blank letters of credence, and on the 28th of October, 1832, Edward Livingston, Secretary of State, instructed him that the United States had 'it in contemplation to institute a separate mission to Japan,' but that if he should find the prospect favorable he might fill up one of his letters and present himself to the Emperor for the purpose of opening trade. Nothing was accomplished by this mission in that quarter.

"Again, in 1845, Alexander Everett was empowered to open negotiations with the Japanese Government, and Commodore Biddle was instructed to 'take the utmost care to ascertain if the ports of Japan were accessible.' The commodore did go to the Bay of Yeddo, and remained there several days. The Japanese refused to open their ports. They said, 'This has been the habit of our nation from time immemorial. In all cases of a similar kind that have occurred we have positively refused to trade. Foreigners have come to us from various quarters, but have always been received in the same way. In taking this course with regard to you, we only pursue our accustomed policy.'

"In the spring of 1849 it came to the knowledge of Commodore Geisinger, commanding the United States East India Squadron, that some American sailors were imprisoned in Japan, and Commander Glynn was dispatched to Nagasaki to liberate them. He succeeded in doing so, and on his return he laid before the President reasons why he thought it to be 'a favorable time for entering upon a negotiation with Japan.'

"The Dutch Government at that time had the monopoly of the foreign trade of Japan. The Dutch minister at Washington, under instructions from his Government, at this juncture, informed the Government of the United States that it was not to be supposed that there

was 'any modification whatever of the system of separation and exclusion which was adopted more than two centuries ago by the Japanese Government, and since the establishment of which the prohibition against allowing any foreign vessel to explore the Japanese coast has been constantly in force.'

"Mr. Webster, Secretary of State, soon after the receipt of this note, instructed Commodore Aulick to proceed with a letter from President Fillmore to the Emperor of Japan to Yeddo in his flag-ship, accompanied by as many vessels of his squadron as might conveniently be employed in the service, and to deliver it to such high officers of the Emperor as might be appointed for the purpose of receiving it. The principal object of his visit was to arrange for obtaining supplies of coal, but he also received 'full power to negotiate and sign a treaty of amity and commerce between the United States and the Empire of Japan.' This was in June, 1851. In November, 1852, Commodore Perry was sent out with an increased naval force. 'A copy of the general instructions given to Commodore John H. Aulick' was handed him, which he was to consider as 'in full force, and applicable to his command.' He succeeded in concluding a treaty on the 31st of March, 1854. The interesting negotiations which preceded it are detailed in the document above referred to. An account of the expedition, from the journals of Commodore Perry and officers under his command, was compiled by the Rev. Francis L. Hawks, D. D., and printed in quarto form by order of the House.

"The rights of Americans in Japan were further extended by a convention concluded at Simoda on the 17th of June, 1857; and in the following year a more extensive treaty was concluded, in which it was provided that all the provisions of the convention of 1857, and so much of the treaty of 1854 as were in conflict with the new treaty were revoked.

"In 1859 it was determined to send a Japanese embassy to the United States; and this was done in 1860. In 1864 a convention was concluded for the payment to the United States, Great Britain, France, and the Netherlands of an aggregate sum of three millions of dollars, 'this sum to include all claims of whatever nature, for past aggressions on the part of Nagato, whether indemnities, ransom for Simonoseki, or expenses entailed by the operations of the allied squadrons.' The circumstances which led to the conclusion of this treaty were thus stated by Mr. Fish in a report to the President: 'The Japanese indemnity fund comes from payments made by the Japanese Government under the convention of October 22, 1864, of which a copy is herewith inclosed. It appears that Prince Choshu, the ruler over the provinces of Suenoo and Nagato, having possession of the Japanese fortifications which command the Straits of Simonoseki, and also having with him the person of the Mikado, refused to recognize the validity of the treaties concluded by the Tycoon with the foreign powers, and closed the passage to the inland sea. At the request of the Tycoon's government the forces of the United States, Great Britain, France, and the Netherlands, in those waters, jointly proceeded to open the straits by force. On the 4th, 6th, 7th, and 8th days of September, 1864, they destroyed the batterries commanding the straits, blew up the magazines, threw the shot and shell into the sea, carried away seventy cannon, and obtained an unconditional surrender from Prince Choshu, with an agreement to pay the expenses of the expedition. The ratification of the treaties by the Mikado, and the firm establishment of the foreign policy of the Tycoon also, speedily followed.

The Government of the Tycoon, preferring to assume the expenses of the expedition, which the rebellious prince had agreed to pay, entered into the convention of October 22, 1864, stipulating to pay the four powers three millions of dollars, 'this sum to include all claims, of whatever nature, for past aggressions on the part of Nagato, whether indemnity, ransom for Simonoseki, or expenses entailed by the operation of the allied squadrons,' 'the whole sum to be payable quarterly,' in installments 'of half a million of dollars.' One million and a half of dollars have been paid under this convention, and one million and a half of dollars remain unpaid. The Japanese Government have asked to have the payment of the unpaid balance deferred till May 15, 1872, on terms set forth in the inclosed correspondence, and this Government has consented as to its portion (one-fourth), on condition that the other powers also consent. Of the amounts already paid, one-fourth came to the possession of the United States, which appears to have yielded to its credit with Baring Brothers, in London, the sum of eighty-eight thousand eight hundred and eighty-one pounds eighteen shillings and tenpence sterling (£88,881 18*s.* 10*d.*). This transferred to New York, produced in currency the sum of five hundred and eighty-six thousand one hundred and twenty-five dollars and eighty-seven cents ($586,125.87), which was invested in ten-forty bonds of the United States at par. The interest on the bonds, as accruing, has been invested in the same class of bonds. The disbursing clerk of the Department of State now holds, as belonging to this fund, such registered bonds to the amount of seven hundred and five thousand dollars ($705,000) at par. The Secretary of State is not aware of any claims against this fund.'

"It so happened that there was no vessel in the naval service of the United States that was in a condition to take part in this expedition. The Ta Kiang was therefore chartered for the service, and was manned with a crew of eighteen persons from the Jamestown, which, with her own crew of forty, made a crew of fifty-eight in all. The Ta-Kiang had three guns, and received one thirty-pound Parrott gun from the Jamestown. The actual cost of the expedition to the United States was $9,500 for the charter, and $1,848 for the coal consumed.

"In 1867 it became necessary to make 'arrangements for the establishment of a Japanese municipal office for the foreign settlement of Yokohama.' By this arrangement, which 'was adopted and agreed to by the foreign representatives and the Japanese Government,' 'the principle of extraterritoriality was carefully preserved,' as to the treaty powers.

"In a recent discussion between the Japanese minister for foreign affairs and the Peruvian envoy, the former thus speaks of this agreement, and its relations to citizens of non-treaty powers: 'It was a temporary arrangement, thought essential, say the foreign ministers who recommended it, "*under present circumstances*, to secure the maintenance of order and health within the foreign settlement." It did not fix any time within which it should remain in force. It is therefore either binding forever, or it might be abrogated at the pleasure of this Government. * * * Peru was then and is now a non-treaty power. Your excellency would be astonished and indignant if you were told by the officer whom His Majesty the Tenno may authorize to negotiate with you a treaty of amity and commerce, that while perfectly free on all other points, we cannot relieve the citizens of Peru from being subject to coercive jurisdiction exercised by the majority of a board of foreign consuls. You would ask, I think, by what right the ministers

of Great Britain, France, the United States, Germany, and Holland undertook to stipulate in what manner the citizens of Peru should be tried. * * * If the pretensions of some of the consuls were admissible, that they had a right not only to give advice, but that their advice, or that of a majority of them, should be controlling, so that the governor of Kanagawa would be only a mouth-piece to utter their decision, then the extraordinary result would follow that this Government might be made responsible to a foreign nation for an erroneous decision, which it had no power to prevent or reverse.'"

Mr. J. C. B. Davis, Notes, &c.

The Government of the United States had, in 1852, the right to insist upon Japan entering upon such treaty relations as would protect travellers and sailors from the United States visiting or cast ashore on that island from spoliation or maltreatment, and also to procure entrance of United States vessels in Japanese ports.

Mr. Conrad, Asst. Sec. of State, to Mr. Kennedy, Nov. 5, 1852. MSS. Notes, Special Missions.

A United States consular court in Japan cannot, under the treaty of 1858 with that country and the laws of the United States (12 Stat. L., 72; Rev. Stat., § 4083), render a judgment against a person of foreign birth not a citizen of the United States.

11 Op., 474, Speed, 1866. See *supra*, § 125.

As to treaties on consular jurisdiction in Japan, see *supra*, §§ 68, 125. See also Mr. Eli T. Sheppard's pamphlet on Extraterritoriality in reference to Japan.

Questions concerning intervention in Japan are discussed *supra*, § 68.

(17) MEXICO.

§ 154.

As to interposition in Mexico, see *supra*, § 58.

As to Mexico's restrictions on aliens, see *infra*, § 172*a*.

President J. Q. Adams's message of February 12, 1827, transmitting the Mexican treaty of July 10, 1826, with the accompanying documents, is contained in Senate Doc. 454, 19th Cong., 2d sess.; 6 Am. St. Pap. (For. Rel.), 578.

President J. Q. Adams's message of April 25, 1828, containing "a treaty of amity, commerce, and navigation between the United States of America and the United Mexican States," signed February 14, 1828, is in Senate Doc. 487, 20th Cong., 1st sess.; 6 Am. St. Pap. (For. Rel.), 952.

"In 1825 Mr. Poinsett was dispatched as minister to Mexico. He was instructed to 'bring to the notice of the Mexican Government the message of the late President of the United States to their Congress, on the 2d of December, 1823, asserting certain important principles of intercontinental law in the relations of Europe and America. The first principle asserted in that message is, that the American continents are not henceforth to be considered as subjects for future colonization by any European powers. * * * The other principle asserted in the

message is, that whilst we do not desire to interfere in Europe with the political system of the allied powers, we should regard as dangerous to our peace and safety any attempt on their part to extend their system to any portion of this hemisphere.' (See discussion on these points, *supra*, § 57.)

"Poinsett was further instructed to secure, if possible, a treaty of limits and a treaty of amity and commerce, on the basis of the recently concluded convention with Colombia. The treaty which he signed, and the account of the negotiations which preceded it, will be found in the 6th volume of the folio edition of the Foreign Relations, pages 578–613. This treaty did not receive the assent of the Senate, except upon conditions which caused it to fail. The treaty of limits of 1828 was then concluded, and in 1831 a treaty of amity and commerce was signed, which is still in force.

"The war between Texas and Mexico affected the relations between Mexico and the United States, and was the cause of frequent communications from the Executive to Congress, and of frequent discussions and reports in that body. At one time, in the early stage of the discussion, the Mexican minister withdrew himself from Washington, but relations were soon restored. (See *supra*, §§ 58, 72.)

"Claims began to arise and to be pressed against Mexico as early as 1836. In 1837 they were made the subject of Presidential messages. A convention was concluded for the adjustment of these claims in 1838, which was not ratified by the Mexican Government; and another convention was concluded and ratified by both parties, for the same purpose, in April, 1839. The acts of Congress to carry this into effect were approved on the 12th of June, 1840, and on the 1st of September, 1841. (*Supra*, § 22.)

"When the commissioners on each side met together [William L. Marcy was one of the United States commissioners], a radical difference of opinion on important subjects was found to exist. (1) The American commissioners regarded the joint body as a judicial tribunal. The Mexican commissioners regarded it as a diplomatic body. (2) The Americans asserted that the claimants had a right to appear personally or by counsel before the commissioners. The Mexicans denied this, and insisted that the proof must come through the Government. Much time was lost in these and kindred discussions; so that, when the last day for action had passed, several claims had not been acted on. This was the cause of much subsequent correspondence. Mexico did not keep its engagements under this treaty, and in 1843 a new convention respecting the payments was made, in which it was agreed that another claims convention should be entered into; but this had not been done when war broke out between the parties, in 1846.

"A treaty was concluded with Texas for its annexation to the United States, but it failed to receive the assent of the Senate. Congress then, by joint resolution, declared that it 'doth consent that the territory properly included within, and rightfully belonging to, the Republic of Texas may be erected into a new State, to be called the State of Texas,' and on the 29th of December, 1845, it was jointly resolved 'that the State of Texas shall be one * * * of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.' (See *supra*, §§ 58, 72.)

"On the 13th of the following May Congress declared in the preamble of the act providing for the prosecution of the war with Mexico, that 'by the act of the Republic of Mexico a state of war exists between

that Government and the United States,' and on the same day President Polk made proclamation of that fact.

"While hostilities were going on, Nicholas P. Trist, chief clerk of the Department of State, was dispatched to Mexico, and opened negotiations for peace. He was instructed to demand the cession of New Mexico and California in satisfaction of claims against Mexico on the ground that 'a state of war abrogates treaties previously existing between the belligerents, and a treaty of peace puts an end to all claims for indemnity.' The proposals were rejected by Mexico, and the commissioner was recalled on the 6th of October, 1847. He remained, however, in Mexico, notwithstanding the instructions to return, and he succeeded in concluding the treaty of Guadalupe-Hidalgo on the 2d of February, 1848. This was communicated to the Senate on the 23d of February. Sundry amendments were made by the Senate and accepted by Mexico, and the ratifications were exchanged on the 30th of May, 1848. * * * On the 6th of July, 1848, the President communicated the treaty to Congress, with a message asking legislation to carry it into effect. On the 29th of the same month the act for the payment of the liquidated claims against Mexico passed Congress. (*Supra*, § 131*a*.) The civil and diplomatic appropriation bill, approved on the 12th of August, contained a provision for the survey of the new boundary line, and in the following session provision was made for payment in part of the sums due to Mexico under the 12th article. On the 3d of March, 1849, a commission was created to examine the claims upon Mexico, which were to be assumed by the United States; and on the 3d of March, 1851, a loan was authorized for their payment. One hundred and eighty-two claims were allowed, and seventy were rejected.

"In the exchange of the ratifications of the treaty of Guadalupe-Hidalgo, certain explanations were embodied in a protocol signed by the plenipotentiaries. These became the subject of a discussion in Congress early in 1849 which induced the Mexican minister at Washington (who appears to have been the same person who, as plenipotentiary, exchanged the ratifications of the treaty on the part of Mexico), to ask of Mr. Buchanan, the Secretary of State, an assurance in the form of a message from the President, that the United States adhered to the protocol. Buchanan replied that 'the President would violate the most sacred rights of the legislative branch of the Government if he were to criticise or condemn any portion of their proceedings, even to his own countrymen; much less, therefore, can he be called upon by the representative of a foreign Government for any explanation, condemnation, defense, or approval of their proceedings. * * * The President will be ever ready, in the kindest spirit, to attend to all representations of the Mexican Government, communicated in a form which does not interfere with his own rights or those of Congress.'"

Mr. J. C. B. Davis, Notes, &c. See, on last point, *supra*, § 133.

"In 1861 an extradition treaty was concluded with Mexico, and in 1868 a naturalization convention, and a convention for the establishment of a claims commission. The commission was duly organized in Washington. Its powers were extended by a convention, concluded April 19, 1871, and a further extension was authorized by a convention concluded November 27, 1872."

Mr. J. C. B. Davis, Notes, &c.

The proceedings of the Senate on the Guadalupe Hidalgo treaty, from which the injunction of secrecy has been removed, are in Senate Ex. Doc. 52, 30th Cong., 1st sess. Other papers relative thereto are in House Ex. Docs. 40, 56, 60, 69, 70, 30th Cong., 1st sess. For communication of the Secretary of State, Mr. Buchanan, and of President Polk, of February 8, 1849, as to negotiation of this treaty, see House Ex. Doc. 50, 30th Cong., 2d sess.

Mr. Sumner, on July 14, 1870 (Senate Rep. 261, 41st Cong., 2d sess.), from the Committee on Foreign Relations, to whom was referred the petition of Mr. N. P. Trist, for compensation for diplomatic services, made a report from which the following passages are taken:

"The services of Mr. Trist constitute an interesting chapter in the history of our country. As negotiator of the treaty of Guadalupe-Hidalgo, he exercised a decisive influence in terminating the war with Mexico, by which we were secured in the blessings of peace and in the possession also of an undisputed title to Texas, and an addition to the national domain equal in area to the present territory of Mexico, and including in its expanse the great and prosperous State of California.

"Mr. Trist, while chief clerk of the State Department, and in confidential relations with Mr. Buchanan, the Secretary of State, was selected as 'commissioner to negotiate and conclude a settlement of existing differences and a lasting treaty of peace' with Mexico. On the 16th April, 1847, he left Washington and proceeded to the headquarters of the Army of the United States in Mexico, where for several months he labored anxiously to accomplish the object of his important mission. Not until November, 1847, was the first great point reached. This was the appointment of a commission on the part of the Mexican Government authorized to negotiate.

"Meanwhile at Washington there was a spirit hostile to negotiation; Mexico was not sufficiently humiliated. In the midst of his negotiation, when a treaty of peace was almost within his grasp, on the 16th November, 1847, Mr. Trist suddenly received a letter of recall, with the order to return home by the first safe opportunity. After careful deliberation, and with the sure conviction that if his efforts were thus abruptly terminated the war would be much prolonged, while the difficulties of obtaining another Mexican commission would be increased, he concluded to proceed, and do what he could for the sake of peace. The Mexicans to whom he communicated the actual condition of affairs united with him, and a treaty was signed on the 2d February, 1848, at Guadalupe-Hidalgo. Mr. Trist remained in Mexico until the 8th of April, 1848, in order to protect the interests of the United States, and would have remained longer had not an order for his arrest, sent from Washington to our military authorities, compelled him to leave.

"It is understood that the President, on the arrival of the treaty, proposed to suppress it; but, unwilling to encounter public opinion, which was favorable to peace, he communicated it to the Senate, when, with certain amendments, it was ratified by a vote of 38 yeas to 14 nays. And thus the war with Mexico was closed.

"The commissioner who had taken such great responsibility reached Washington on his return in June, 1848, only to encounter the enmity of the Administration then in power. His mission had been crowned with success but he was disgraced. By order of President Polk his pay was stopped at November 16, 1847, so that the service, as peacemaker, rendered after that date was left without compensation as without honor. Mr. Trist was proud and sensitive. He determined to make

no application at that time for the compensation he had earned, and to await the spontaneous offer of it unless compelled by actual want."

For President Polk's message on this treaty see *supra*, § 130.

Mr. Trist's instructions were as follows:

"Since the glorious victory of Buena Vista, and the capture of Vera Cruz and the Castle of San Juan d'Ulloa by the American arms, it is deemed probable that the Mexican Government may be willing to conclude a treaty of peace with the United States. Without any certain information, however, as to its disposition the President would not feel justified in appointing public commissioners for this purpose, and inviting it to do the same. After so many overtures, rejected by Mexico, this course might not only subject the United States to the indignity of another refusal, but might in the end prove prejudicial to the cause of peace. The Mexican Government might thus be encouraged in the mistaken opinion which it probably already entertains, respecting the motives which have actuated the President in his repeated efforts to terminate the war.

"He deems it proper, notwithstanding, to send to the headquarters of the Army a confidential agent, fully acquainted with the views of this Government, and clothed with full powers to conclude a treaty of peace with the Mexican Government, should it be so inclined. In this manner he will be enabled to take advantage, at the propitious moment, of any favorable circumstances which might dispose that Government to peace.

"The President, therefore, having full confidence in your ability, patriotism, and integrity, has selected you as a commissioner to the United Mexican States, to discharge the duties of this important mission."

A notice of the negotiations which preceded the treaty of Guadalupe-Hidalgo, is given in an appendix to Mr. Sumner's report.

Mr. Trist left Washington (where he was chief clerk in the Department of State) on April 16, 1847. He reached Vera Cruz on May 6. According to the statement given in Mr. Sumner's report, Mr. Trist on November 16, 1847, received the following letter of recall, dated October 6:

"They, the Mexican Government, must attribute our liberality to fear, or they must take courage from our supposed political divisions. Some such cause is necessary to account for their strange infatuation. In this state of affairs, the President, *believing that your continued presence with the Army can be productive of no good, but may do much harm by encouraging the delusive hopes and false impressions of the Mexicans*, has directed me to recall you from your mission, and instruct you to return to the United States by the first safe opportunity."

The statement annexed to Mr. Sumner's report thus continues:

"Thus situated, Mr. Trist did, nevertheless, forthwith enter upon a a course of strict conformity with his recall. In his dispatch, acknowledging the simultaneous receipt of the recall, and its reiteration under dates October 6 and 25, he says:

"'My first thought was immediately to address a note to the Mexican Government, advising them of the inutility of pursuing their intention to appoint commissioners to meet me. On reflection, however, the depressing influence which this would exercise upon the peace party, and the exhilaration which it would produce among the opposition, being but too manifest, I determined to postpone making this communication offi-

cially, and meanwhile privately to advise the leading men of the party, here and at Queretaro, of the instructions which I had received.' * * *

"That 'first safe opportunity,' by which Mr. Trist was thus ordered to return, did not occur until the 10th day of December. When the order reached him, (November 16, 1847), it was expected that an army train for Vera Cruz would leave the city of Mexico about the end of that month. Owing, however, to the unexpected detention at that port of a train which had been sent there for supplies, the departure of the one with which Mr. Trist had prepared to leave was postponed, first, to the 4th of December, and then to the 10th. On this day the train started. Mr. Trist, however, did not go with it. Had it been delayed no later than the 4th, in such case his return journey would have begun on the morning of that day."

Mr. Trist, on December 6, sent the following dispatch to the Secretary of State:

"Referring to my previous dispatches in regard to the political state of this country, and to the inclosed copy of a confidential letter, under date the 4th instant, to a friend at Queretaro, to whose able and indefatigable co-operation in the discharge of the trust committed to me I have, from the very outset, been greatly indebted, I will here enter at greater length into the considerations by which I have been brought to a resolve so fraught with responsibility to myself; whilst, on the other hand, the circumstances under which it is taken are such as to leave the Government at perfect liberty to disavow my proceeding, should it be deemed disadvantageous to our country."

"The friend at Queretaro, 'to whose able and indefatigable co-operation' Mr. Trist so acknowledged his deep obligations," continues the statement in Mr. Sumner's report, "was Mr. Edward Thornton, at that time, owing to the retirement of the British minister from ill-health, left in charge of the British legation in Mexico. The same gentleman is now the representative of his sovereign to our Government.

"The resolve so formed by the ex-commissioner of the United States was to this effect: Should the Mexican Government be willing, he would take upon himself to engage with its plenipotentiaries in the work which had been so unexpectedly prevented by his recall. All such action on his part would, of course, be devoid of validity and of all binding force upon our Government. Nevertheless, should the negotiation result in their agreeing upon the terms of a treaty, such treaty would secure to the cause of peace the chance of its adoption by the Government of the United States, upon its being presented with the option so to put an end to the war.

"The attempt so ventured upon was crowned with success. His proposal was accepted by the Mexican Government. The plenipotentiaries who, just before his recall arrived, had been selected to meet him, were commissioned. They at once went to work, and the work was plied so diligently that in about six weeks' time from their first regular conference their task was brought to its desired end by the signing at Guadalupe-Hidalgo, on the 2d of February, 1848, of the document in the form of a treaty, which was immediately sent to the Secretary of State at Washington.

"Every possible provision having been made for its speedy conveyance, it reached its destination in sixteen or seventeen days after signature—the quickest time ever made by man between the capitals of the two Republics—the bearer being James L. Freaner, a native of the State

of Maryland, and the only man who had been in any way instrumental in determining Mr. Trist to make the attempt of which that document was the result.

"On the 23d of February, 1848, some days after its arrival at Washington, the document received from Mr. Trist was communicated by the President to the Senate, with a message, bearing date the day previous (February 22), beginning thus:

"'I lay before the Senate, for their consideration and advice as to its ratification, a treaty of peace, friendship, limits, and settlement, signed at the city of Guadalupe-Hidalgo on the 2d day of February, 1848, by N. P. Trist, on the part of the United States, and by plenipotentiaries appointed for that purpose on the part of the Mexican Government.'

"By the Executive action so taken upon the document, the invalidity of that in which it originated was cured, and it became transmitted into a genuine treaty, so far as the President's sole authority was competent to impart this character to it.

"A week later, on the 29th of the same month, in another message to the Senate, the President took occasion to explain that his first message was intended to be understood as positively *recommending* the treaty for adoption—the words upon this point in the second message being:

"'I considered it to be my solemn duty to the country, uninfluenced by the exceptionable conduct of Mr. Trist, to submit the treaty to the Senate with a *recommendation* that it be ratified with the modifications suggested.'

"Incorporated with this express recommendation are the President's reasons for considering it his solemn duty to make it; among which assigned reasons is his belief, 'that, *if the present treaty be rejected, the war will probably be continued*, at a great expense of life and treasure, *for an indefinite period.*'

"After thorough discussion by the Senate, extending from February 23 to March 10, in which it underwent various modifications, its ratification was advised and consented to by a vote of 38 yeas to 14 nays."

The position in respect to negotiation and ratification by Mexico was not unlike the subsequent position of France after the Franco-German war. The difficulty was not so much in settling the terms of peace as in finding in the conquered country a stable government with whom these terms could be settled.

Mr. Trist, in his dispatch of February 2, 1848, transmitting the treaty, thus notices this question:

"With respect to the *ratification* of the treaty, I believe the chances to be *very* greatly in its favor. * * * The elections are yet to be held in the States of Vera Cruz and Puebla. In the former the *puros* (war party) never had any strength whatever; in the latter not enough to counteract a vigorous and concerted effort on the part of the *moderados*. These elections will now speedily take place, under the arrangements for facilitating them which will be entered into in pursuance of the second article of the treaty (inserted *with a special view to this object*); and *the result will, according to every probability, give to the peace party in Congress a preponderance so decided as to insure its prompt ratification.*"

"Ten days later his dispatch No. 29, February 12, 1848, transmitting the maps referred to in the fifth article of the treaty, closes with these words:

"'I take great pleasure in stating that the probabilities of the ratification of the treaty by Mexico, which were previously very good, *have*

been growing stronger and stronger every hour for several days past, and that there is good reason to believe that it may take place within two months of this date.

"'In the accompanying Monitor Republicano of the 11th instant will be found the circular of the minister of relations to the governors of States informing them of the signature of the treaty.'

"These anticipations of Mr. Trist, both as to the results of the election in augmenting the preponderance already acquired by the peace party in Congress, and as to the use which would be made of this preponderance, were soon verified to the very letter, and far beyond it.

"Intelligence reaching Mexico that the Senate of the United States were engaged in making amendments to the treaty, all action of the Mexican Government in regard to its ratification was suspended until the amendments so made should become known. They became so officially by the letter of the Secretary of State of the United States, March 18, to the minister of relations. Upon its receipt by him, the treaty, as ratified by the Government of the United States, with the amendments of our Senate, was laid before the Mexican Congress, both houses of which must advise and consent to a treaty before it can be ratified. First taken up in the Chamber of Deputies, it was adopted there by a large majority; then in the Senate, it passed that body by a vote of 33 yeas to 5 nays."

Sen. Rep. 261, 41 Cong., 2d sess.

The antecedents and effect of the treaty of Guadelupe-Hidalgo are discussed in 2 Lawrence com. sur droit int., 338.

The 8th section of the treaty of Guadalupe-Hidalgo, guaranteeing titles, &c., had reference to the territory acquired by the United States by that treaty, and did not refer to Texas.

McKinney *v.* Saviego, 18 How., 235. See further, *supra*, § 4.

The United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Guadalupe-Hidalgo to protect the rights of property of the inhabitants of the ceded territory or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of the former Government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable.

U. S. *v.* Auguisola, 1 Wall., 352.

The cession of California to the United States did not impair the rights of private property. These rights were consecrated by the law of nations and protected by the treaty of Guadalupe-Hidalgo.

U. S. *v.* Moreno, 1 Wall., 400.

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., 51.

The treaty of Guadalupe-Hidalgo between the United States and Mexico makes no distinction, in the protection it provides, between the property of individuals and the property held by towns under the Mexican Government.

Townsend *v.* Greeley, 5 Wall., 326.

The protection which by the treaty of Guadalupe-Hidalgo the United States promised to Mexican grantees extended to rights which they then held.

Henshaw *v.* Bissell, 18 Wall., 264.
As to extension of juridical rights, see Atocha *v.* U. S., 8 C. Cls., 427.

Under the Mesilla treaty seven millions of dollars were to be paid on exchange of ratifications, and three millions when the new boundary line was established.

7 Op., 582, Cushing, 1855.

The question whether the United States will pay, according to their original tenor, drafts drawn by the Mexican Government, under the Mesilla convention, or suspend the payment at the subsequent request of that Government, is matter of political, not of legal, determination.

7 Op., 599, Cushing, 1855.

The treaty questions concerning intervention in Mexico are discussed, *supra*, § 58.

As to treaty giving equal privileges as to real estate, see *infra*, § 234.
As to treaty with Mexico in respect to citizenship, see *infra*, § 189.
As to violation of treaty duties by Mexico, see *infra*, § 230.

(18) NETHERLANDS.

§ 155.

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

12 Op., 5, Stanbery, 1866. See, as to abrogation of treaty of 1782, *supra*, § 137*a*.

The history of the negotiations with the Netherlands prior to the adoption of the Constitution of the United States is given in Mr. J. C. Bancroft's Notes to the Treaties of the United States.

As to Netherlands spoliations, see *infra*, § 228.

(19) PARAGUAY.

§ 156.

The United States treaty relations with Paraguay are discussed in the correspondence annexed to President Buchanan's message at first session of 35th Congress, December 7, 1857.

The proceedings against Paraguay in 1857 are noticed, *infra*, § 321.

(20) PERU.

§ 157.

Article X in the treaty of July 26, 1851, negotiated with Peru by Mr. J. Randolph Clay, an accomplished diplomatist, is as follows:

"The Republic of Peru, desiring to increase the intercourse along its coasts, by means of steam navigation, hereby engages to accord to any citizen or citizens of the United States who may establish a line of steam vessels to navigate regularly between the different ports of entry within the Peruvian territories, the same privileges of taking in and landing freight, entering the by-ports for the purpose of receiving and landing passengers and their baggage, specie, and bullion, carrying the public mails, establishing depots for coal, erecting the necessary machine and workshops for repairing and refitting the steam vessels, and all other favors enjoyed by any other association or company whatsoever. It is furthermore understood between the two high contracting parties, that the steam vessels of either shall not be subject in the ports of the other party to any duties of tonnage, harbor, or other similar duties whatsoever, than those that are or may be paid by any other association or company."

As a preliminary of this treaty, an expedition has been sent by the Government of the United States to South America for the purpose of exploring the river Amazon and its tributaries, and ascertaining the opportunities for commerce which they opened. The Brazilian Government, advised of these movements, sent an envoy to Peru and Bolivia to counteract them; and on October 21, 1851, a treaty was executed between Peru and Brazil providing that the navigation of the Amazon should be controlled by the riparian sovereigns; providing, also, for a subsidy by Peru to a projected Brazilian steamship enterprise. Mr. Clay, on discovering the character of this treaty, and finding that an effort was making by Brazil to induce Bolivia to accede to it, succeeded, through Lieutenant Herndon, who was then on Bolivian waters in charge of the United States exploring expedition, in preventing Bolivia accepting the exclusive policy as to the Amazon which Brazil had imposed on Peru. Brazil, in furtherance of her pretensions to the absolute control of the Amazon, and in conformity, as she alleged, with her treaty of 1851 with Peru, incorporated a distinctively Brazilian steamship company to which she conceded the monopoly of steam navigation on the river.

On January 27, 1853, as we have already seen (*supra*, § 40), Bolivia declared all navigable waters flowing through her territory to be free to the commerce of all nations. Mr. Clay, having urged on Peru that her accession to the Brazilian policy was in contravention of her treaty of 1851 with the United States, obtained from her a decree extending to all the most favored nations the privileges granted to Brazil, and mak-

ing the cities of Nauta and Loreto ports of entry, open to the commerce of the world. This was followed by protests from Brazil addressed to other South American States, and by a series of complicated negotiations (see summary in Schuyler's Am. Diplomacy, 331 *ff.*), in which, in 1853, the British and French envoys took part. The Brazilian Government, having made inquiries of the United States as to the "naval demonstrations" United States vessels were then making on the Amazon, Mr. Marcy, then Secretary, answered, on September 22, 1853, disclaiming any intention to use force, and proceeding to say:

"It appears to the undersigned that no means would be more certain to lead to this result (that of developing Brazilian resources) than the removal of unnecessary restrictions upon the navigation of the Amazon, and especially to the passage of vessels of the United States to and from the territories of Bolivia and Peru, by the way of that river and its tributaries."

On August 8, 1853, Mr. Trousdale, minister to Brazil, was instructed by Mr. Marcy, Secretary of State, to claim for United States vessels free transit of the Amazon for commercial intercourse with Ecuador, Bolivia, Peru, and Colombia, appealing for this purpose to the action of the congress of Vienna, cited *supra*, § 40. In this instruction is the following passage:

"This restricted policy which it is understood Brazil still persists in maintaining in regard to the navigable rivers passing through her territories is the relic of an age less enlightened than the present. The doctrine upon this subject is clearly presented in the following extract from Wheaton's Elements of International Law.

"'Things of which the use is inexhaustible, such as the sea and running water (including, of course, navigable streams) cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications.'

"The soundness of this principle cannot, I presume, be controverted by the Imperial Government of Brazil. It will not, therefore, it is believed, without denying rights to our citizens to which they are fairly entitled, longer withhold from them the use of the Amazon to carry on commercial intercourse with Ecuador, Peru and Bolivia, New Granada, and Venezuela. You will claim from it the renunciation of any authority it may have heretofore exercised to prevent the passage of the merchant vessels of the United States up and down that river in their legitimate commerce with any of these Republics. You are instructed to claim for our citizens the use of this natural avenue of trade. This right is not derived from treaty stipulations—it is a natural one—as much so as that to navigate the ocean—the common highway of nations.

By long usage it is subject to some restrictions imposed by nations through whose territories these navigable rivers pass. This right, however, to restrict or regulate commerce, carried to its utmost extent, does not give the power to exclude such rivers from the common use of nations."

MSS. Inst., Brazil.

President Pierce, in his first annual message, December, 1853, said, speaking of the obstructive policy of Brazil in this relation:

"Our minister at Brazil is instructed to obtain a relaxation of that policy, and to use his efforts to induce the Brazilian Government to open to common use, under proper safeguards, this great natural highway for international trade."

On January 4, 1854, the Peruvian Government, succumbing to Brazil, issued a decree giving Brazil exclusive privileges in the navigation of the Amazon. On December 9, 1863, the treaty of 1851, in accordance with a notice given a year previous, in conformity with its 40th article, was terminated. This caused a temporary cessation of all treaty relations between the United States and Peru. With Bolivia (see *supra*, § 40), a treaty was agreed on in 1858 (signed May 13, 1858, ratifications exchanged November 9, 1862, proclaimed January 8, 1863), in which articles 26 and 27 are as follows:

ART. XXVI. "In accordance with fixed principles of international law, Bolivia regards the rivers Amazon and La Plata, with their tributaries, as highways or channels opened by nature for the commerce of all nations. In virtue of which, and desirous of promoting an exchange of productions through these channels, she will permit, and invites, commercial vessels of all descriptions of the United States, and of all other nations of the world, to navigate freely in any part of their courses which pertain to her, ascending those rivers to Bolivian ports, and descending therefrom to the ocean, subject only to the conditions established by this treaty, and to regulations sanctioned, or which may be sanctioned, by the national authorities of Bolivia not inconsistent with the stipulations thereof.

ART. XXVII. "The owners or commanders of vessels of the United States entering the Bolivian tributaries of the Amazon or La Plata shall have the right to put up or construct, in whole or in part, vessels adapted to shoal-river navigation, and to transfer their cargoes to them without the payment of additional duties; and they shall not pay duties of any description for sections or pieces of vessels, nor for the machinery or materials which they may introduce for use in the construction of said vessels.

"All places accessible to these, or other vessels of the United States, upon the said Bolivian tributaries of the Amazon or La Plata, shall be considered as ports open to foreign commerce and subject to the provisions of this treaty, under such regulations as the Government may deem necessary to establish for the collection of custom-house, port, light-house, police, and pilot duties. And such vessel may discharge and receive freight and cargo, being effects of the country or foreign, at any one of said ports, notwithstanding the provisions of article 3."

On December 7, 1866, the Brazilian Government, by an imperial decree, to take effect on September 7, 1867, opened the Amazon to the

merchant vessels of all nationalities; and on December 17, 1868, a decree was issued by the President of Peru to the same effect.

See Lawrence's Wheaton (ed. 1863), notes 363–365; Peruvian Treaties, Lima-1870; 7 Oviédo, 108–134; cited by Mr. Schuyler's Am. Diplom., 344; Engelhart, du Regime des fleuves, 1870; Maury on Navigation of the Amazon, House Mis. Doc. 22, 33d Cong., 1st sess.; Revue de droit int., 1886, No. 2, 159; Caratheodory, du droit int. concernant les grands cours d'eau, 1861; Fiore, droit int. (1885), § 761. See also distinctions taken, *supra*, § 40.

Under the treaty of 1851 with Peru the United States are not bound to pay a consul of the Peruvian Government the value of property belonging to a deceased Peruvian, on whose estate the consul was entitled to administer, which may have been unjustly detained and administered by a local public administrator.

9 Op., 383, Black, 1859.

An award under the convention with Peru of 1863 "payable in current money of the United States," may legally be paid in Treasury notes or in specie.

11 Op., 52, Bates, 1864.

Questions concerning intervention in Peru are discussed, *supra*, § 59.

"The undersigned, minister resident of Peru, has the honor to inform his excellency the Secretary of State of the United States, that he has received orders from his Government to notify that of the United States that that of Peru, in use of the authority which the first paragraph of article forty of the treaty of friendship, commerce, and navigation concedes to it, concluded at Lima, on the 26th day of July, 1851, and the ratifications of which were exchanged at Washington on the 16th of July, 1852, declares that the said treaty shall altogether cease and determine on the expiration of one year from the present notice.

"The undersigned has also received from his Government the express order to make known to that of his excellency the Secretary of State of the United States, that this measure does not in any manner involve the intention of interrupting the cordial relations which exist between the two countries, its purpose being to restore to them their full liberty, either to declare this treaty in force, or to negotiate another which may be more advantageous to the interests of both nations."

Mr. Barreda, minister of Peru, to Mr. Seward, Sec. of State, Dec. 9, 1862. MSS. Notes, Peru.

"The undersigned, Secretary of State of the United States, has the honor to acknowledge the receipt of the note of Señor F. L. Barreda, minister resident of the Republic of Peru, of the 9th instant, in which, pursuant to instructions received from his Government, notice is given of its intention to terminate and conclude the treaty of 26 July, 1851, between the United States and Peru, within one year from the date of this notification, which is not intended as an indication of any disposition on the part of Peru to interrupt the cordial relations now existing, but merely to leave the two Governments at liberty either to declare

the continuance of the present treaty, or to negotiate another more conducive to mutual interests.

"The Government of the United States cannot but be gratified that that of Peru has taken this step, in order that it may be free to enter into conventional stipulations of the most liberal character, if it should be found more expedient to frame a new than to continue in force the existing treaty; he, therefore, contents himself with acknowledging the receipt of this official notification, assuring Mr. Barreda that the Government of the United States will promptly respond to the liberal and enlightened intentions of Peru in the adoption of such measures as may be deemed most productive of those cordial relations which it is equally the interest as it is undoubtedly the object of both to maintain."

Mr. Seward, Sec. of State, to Mr. Barreda, Dec. 15, 1862. MSS. Notes, Peru; quoted in Mr. J. C. B. Davis, Notes, &c.

As to Peruvian waters, see *supra*, § 30.

(21) PORTUGAL.

§ 158.

The second article of the treaty with Portugal of August 26, 1840, did not restrict either party from laying discriminating duties on merchandise not the growth or production of the nation of the vessel carrying the same into the port of the other nation.

Oldfield *v.* Marriott, 10 How., 146.

(22) RUSSIA.

§ 159.

The message of President Monroe, communicating to the Senate the convention of December 15, 1824, is contained in Senate Doc. No. 384, 18th Cong., 2d sess., 5 Am. St. Pap. (For. Rel.), 432. In this correspondence the respective titles of Russia and of Great Britain to the northwest coast of North America are discussed.

The convention of April 5, 1824 (concluded April 5–17), is given in House Doc. 397, 18th Cong., 2d sess.; 5 Am. St. Pap. (For. Rel.), 583.

For the circumstances attending the negotiation of the commercial treaty with Russia in 1832, see 1 Curtis' Buchanan, 171; 1 Benton's Thirty Years, 606.

As to citizenship in Alaska, see *infra*, § 187.

As to Russia's claim to Northwestern Pacific, see *supra*, § 32; and see also 2 Lyman's Diplomacy of the U. S., ch. xi.

As to treaty of 1832 in its bearings on citizenship, see Mr. Blaine to Mr. Foster, July 28, 1881, quoted *supra*, § 55; also Mr. Frelinghuysen to Mr. Noar, June 14, 1882, *infra*, § 189; and Kie *v.* U. S., 27 Fed. Rep., 351, *infra*, § 187.

As to Russia's position in reference to expatriation, see *infra*, § 171.

As to Russia's prosecution of Jews, *supra*, § 55.

"The convention with Russia will, I presume, be very satisfactory to the nation. It consists of six articles. By the first it is stipulated that the citizens and subjects of the two parties shall not be disturbed

in navigating the great Pacific Ocean nor in landing on the coast (at points which are not already occupied) for the purpose of commerce with the natives, under the following restrictions: Article 2. That the citizens of the United States shall not land at any point where there is a Russian establishment without permission from the governor or commandant, reciprocated as to Russians in our favor. 3. No establishment shall be formed by citizens of the United States, nor under their authority, on the northwest coast of America, nor in the adjacent islands, north of 54° 40′ north latitude; nor by Russians south of that latitude. 4. For ten years from the signature of the treaty the vessels of the two powers and of their citizens and subjects may reciprocally frequent, without impediment, the interior seas, gulfs, harbors, and creeks on the coast to fish and trade with the natives. 5. From this privilege of trade are excepted spirituous liquors, arms, swords, powder, and munitions of war of every kind. Both powers agree to give effect to this provision, it being stipulated that the vessels of neither shall visit or detain the vessels of the other, by the seizure of merchandise or any measure of force, which may be engaged in this commerce; the high contracting parties reserving to themselves the right to fix and inflict the penalties on any breaches of the article. The sixth requires that the ratifications be exchanged in ten months from its signature.

"By this convention the claim to the '*mare clausum*' is given up, a very high northern latitude is established for our boundary with Russia, and our trade with the Indians placed for ten years on a perfectly free footing, and after that term left open for negotiation. The British Government had, at our suggestion, agreed to treat in concert with us on both topics, the navigation and boundaries, including the trade with the Indians, but on seeing that passage in the message which discountenanced the idea of further colonization on this continent, declined it, on the presumption that it would give offense to Russia, a reason which was communicated by Mr. Bagot to the Russian Government and also to Mr. Middleton. By entering into the negotiation with us singly, and conceding to us these points, especially that relating to navigation, the Emperor has shown great respect for the United States. England will, of course, have a similar stipulation in favor of the free navigation of the Pacific, but we shall have the credit of having taken the lead in the affair. I think, also, that the event derives additional importance from the consideration that the treaty has been concluded since the receipt at Petersburg of the message at the opening of the last session of Congress, which expressed sentiments in regard to our principles and hemisphere adverse to those entertained by the holy alliance."

President Monroe to Mr. Madison, Aug. 2, 1824. Madison MSS., Dept. of State.

"From the commencement of their intercourse with Russia, the United States have specifically and prominently had in view:

"1. The negotiation of a treaty or convention of commerce and navi-

gation upon those principles of liberal reciprocity which we have been so anxious to establish with all other nations; and

"2. The establishment, by similar conventional stipulations, of rules for regulating the rights of the respective parties, in the following relations:

"First, where the one is at war and the other neutral;

"Secondly, where both are at war with the same power;

"Thirdly, where they are unfortunately at war with each other.

"For a considerable time our desire in regard to both of these principal points was frustrated by the Russian Government uniformly declining to treat upon the subjects involved in them.

"The main points here adverted to, however, were not necessarily connected; and in the year 1832, Mr. Buchanan, who arrived at St. Petersburg in the month of June of that year, perceiving the Russian Government not unfavorable to the first object of his mission, promptly entered upon the negotiation of a commercial treaty, with a degree of zeal and ability which happily crowned his efforts with success, and finally resulted in the conclusion of a treaty of commerce and navigation between the United States and Russia on the 18th December, 1832. The treaty was ratified by the President, by and with the advice and consent of the Senate, on the 8th April, 1833, the ratifications were exchanged at Washington on the eleventh day of May following, and by this instrument, thus finally concluded, the first principal point I have already adverted to may be considered as entirely disposed of, and as requiring no further attention on your part.

"Mr. Buchanan applied himself with equal promptitude to the second point of his mission; but the Imperial Government declining at that time to entertain any propositions relative to the conclusion of a treaty upon this subject, he returned with the leave of the President to the United States."

Mr. McLane, Sec. of State, to Mr. Dickerson, June 26, 1834. MSS. Inst., Russia.

"The use of the lands on which stood the buildings, once allowed to the Russian-American Company, was extinguished by the treaty of 1867."

14 Op., 302, Williams, 1873.

Although article 6 of the treaty with Russia of 1832 stipulated that no higher duties should be imposed on goods imported from Russia than on like articles imported from other places, if Congress has imposed a different duty upon Russian hemp, the law must be enforced.

Taylor *v.* Morton, 2 Curtis, 454.

It being provided by article 6 of the treaty between the United States and Russia, of 1832, that no higher duties shall be imposed on the importation into the United States of any article the produce or

manufacture of Russia than are or shall be payable on the like article being the produce or manufacture of any other foreign country, and Congress having, by section 1 of act 1861 (12 Stat., 292), imposed a duty on unmanufactured Russian hemp of $40 per ton, and on manila and other hemps of India of $25 per ton, such legislation is a declaration by Congress that such provision of the treaty shall no longer operate as the law of the land in respect to the duty on unmanufactured Russia hemp.

Ropes *v.* Clinch, 8 Blatch., 304.

The action of Senate and House on the treaty for the purchase of Alaska is detailed *supra* § 131*a*. For a history of the negotiation see Seidmore's Alaska, 201*ff*; Bancroft's Alaska, 594*ff*.

"Congress (on the declaration of the armed neutrality of 1780) did not delay to send a minister to Russia, for the armed neutrality presented an admirable occasion of attacking England in a vital organ. Another method of expressing their approbation of the principles of that confederacy was, also, adopted. We copy from the journal of October, 1780, the following paragraph: Congress, willing to testify their regards to the rights of commerce, and their respect for the Sovereign who hath proposed, and the powers who have approved the said regulations, 'resolve that the board of admiralty prepare and report instructions for the commanders of armed vessels commissioned by the United States, conformable to the principles contained in the declaration of the empress of all the Russias on the rights of neutral vessels.' Francis Dana, of Massachusetts, was elected, in December, 1780, minister plenipotentiary to the court of St. Petersburg; he was authorized 'to accede to the convention of the said neutral and belligerent powers protecting the freedom of commerce and the rights of nations,' and to propose a treaty of amity and commerce. This is the only instance in the history of the country in which the United States volunteered themselves a party to a league of sovereigns in Europe, a proceeding that in consequence of the arrangements that have succeeded the pacification of 1815, would, at this day, have excited an intense and profound interest."

1 Lyman's Diplomacy of the U. S., 424.

But "Mr. Dana having passed nearly a year in Russia, never having been presented at court, and not seeing the least prospect of attaining a single object of his mission, left St. Petersburg in August, 1783, for the United States. It was a long interval before that court was again visited by an American minister."

Ibid., 431.

Mr. Dana not having been recognized by the Russian court, there was no opportunity for him to propose to accede to an armed neutrality. After the treaty of peace with Great Britain, however, Congress was not disposed to enter into any alliances which might disturb that peace. The armed neutrality having expired with the general pacification, the United States was relieved from any project to join in its stipulations. But when the United Provinces proposed a renewal of such stipulations, Congress resolved that "whereas the primary object of the resolution of October 8, 1780, and of the commission and instructions to Mr. Dana relative to the accession of the United States to the neutral confederacy,

no longer can operate; and as the true interest of these States requires that they should be as little as possible entangled in the politics and controversies of European nations, it is inexpedient to renew the said powers either to Mr. Dana or to the other ministers of these United States in Europe; but inasmuch as the liberal principles on which the said confederacy was established are conceived to be, in general, favorable to the interests of nations, and particularly to those of the United States, and ought in that view to be promoted by the latter, so far as will consist with their fundamental policy, resolved, that the ministers plenipotentiary of these United States in negotiating a peace be, and they are hereby, instructed, in case they should comprise in the definitive treaty any stipulations amounting to a recognition of the rights of neutral nations, to avoid accompanying them by any engagements which shall oblige the contracting parties to support these stipulations by arms."

"As you have truly remarked, sir, Russia was one of the first powers to hold out the hand of fellowship to us on our appearance in the family of nations. Chief Justice Dana of this State was sent as minister to Russia in 1780, and John Quincy Adams, then a lad of fourteen, was appointed by Congress his private secretary, the youngest person perhaps ever appointed to such an office in this country. * * * Mr. Harris, the British minister, afterwards Lord Malmesbury, succeeded in preventing the immediate recognition of Mr. Dana by the Empress Catherine, but the moment it could be done without offence to Great Britain, that is, as soon as the treaty of 1783 was concluded, she recognized this infant Republic with cordiality. * * * During the war of 1812 with England, Russia tendered her mediation between the two countries. It was not accepted by Great Britain, but the proposal resulted in a direct negotiation and the conclusion of the treaty of Ghent. * * * In that remarkable letter of Prince Gortschakoff, the Russian minister for foreign affairs, dated 10th July, 1861, and addressed to the Russian envoy in this country, to be communicated to the Secretary of State, he uses this memorable language: 'In spite of the diversity of their constitutions and of their interests, perhaps, even because of their diversity, Providence seems to urge the United States to draw closer the traditional bond, as the *basis and very condition* of their political existence. In any event the sacrifices they might impose upon themselves to maintain it (the Union, then threatened by secession) are not to be compared with those which dissolution would bring after it. United, they perfect each other; separated from each other, they are paralyzed.'"

Mr. Everett's address on June 7, 1864, on the reception of the Russian admiral. 4 Everett's Orations, 696 *ff.*

"The correspondence which was transmitted to the Senate with the convention of 1824 may be found in volume 5 of the folio edition of the Foreign Relations, pages 432 to 471.

"Russia, Great Britain, and the United States were each claimants of an indefinite coast line on the Pacific south of latitude 56°. The claims of Russia, which extended to the high seas, are thus stated in John Quincy Adams's instructions to Henry Middleton: 'The pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude on the Asiatic coast, to the latitude of fifty-one north on the western coast of the American continent, and they assume the right of interdicting the *navigation* and the fishery of all other nations to the extent of one hundred

miles from the whole of that coast. The United States can admit no part of these claims. * * * They can in nowise admit the right of Russia to exclusive territorial possession on any part of the continent of North America south of the 60th degree of north latitude. They will maintain the right of their citizens, enjoyed without interruption since the establishment of their independence, of free trade with the original natives of the northwest coast throughout its whole extent.'

"The negotiations under these instructions were delayed under the supposition that Great Britain would take part in them. When Middleton had reason to suppose that separate negotiations were to take place between Great Britain and Russia, he made known to both sides the territorial rights of the United States. Soon after that he began his negotiations with Nesselrode. At the first interview he found him 'as well disposed to treat with us as ever.' In less than two months from the beginning of the negotiations the convention was signed.

"The fourth article of this treaty was to remain in force for ten years. At the expiration of that time the Russian minister at Washington gave notice to the Secretary of State that American sea-captains were infringing upon what Russia regarded as her rights, and suggested that 'the American public should be informed of the actual state of the relations on this subject,' adding that he had been 'ordered to invite the Government of the United States to take the most suitable measures with regard to it.'

"Mr. Forsyth instructed negotiations to be opened at St. Petersburg for the purpose of an indefinite extension of the treaty; but they proved to be fruitless. Nesselrode closed them by saying that it was 'impossible for the Imperial Government to accede to the proposition. * * * The renewal of the fourth article could hardly contribute to extend, in a reciprocally useful manner, the commercial relations between Russia and the United States of America; or, by consequence, answer the constant solicitude of the Imperial Government to cement more and more, and in a mutual interest, the friendly intelligence which it is always happy to cultivate with the Government of the Union.'

"These questions were set at rest by the cession of Alaska. The treaty was communicated to Congress on the 6th of July, 1867, with a request for necessary legislation. The steps taken in the actual transfer of the ceded territory are set forth in the President's message of January 27, 1868. A copy of the treaty of cession, and of the correspondence relating to it, and other correspondence, with 'information in relation to Russian America,' including Mr. Sumner's speech, was communicated to the House on the 17th of February, 1868.

"The subject of the appropriation to carry out this treaty was discussed at length in the House. The chairman of the Committee on Foreign Affairs reported in favor of it. The act was at last passed on the 27th of July. *Supra*, § 131*a*.

Mr. J. C. B. Davis, Notes, &c.

As to contested boundary between Alaska and British Columbia, see Mr. Bayard, Sec. of State, to Mr. Phelps, Nov. 20, 1885. MSS. Inst., Gr. Brit.

The correspondence with Russia in 1878, respecting the boundary between Canada and Alaska will be found in Brit. and For. St. Pap., 1877–'78, vol. 69.

Papers relative to the conflicting titles of Russia and of Great Britain on the northwest coast of North America, are given in House Doc. 328, 1st sess., 17th Cong.; 4 Am. St. Pap. (For. Rel., 851.)

"Alaska seal is now the only seal in the market, since the rookeries of the Antarctic Sea have been so persistently hunted that the seals have become extinct. * * * From the date of the lease in 1870 up to March, 1884, the Alaska Commercial Company (to whom the United States has given a monopoly of the Prybyloff rookeries) has paid $4,662,026. Having invested $7,200,000 in the purchase of the territory, comprising an area of 58,017 square miles, the Government has derived an annual income ranging from $262,500 to $317,000, from two of the smallest islands off its coast."

Scidmore's Alaska, 314. See Bancroft's Alaska, chap. 28, 29.

This gives to the United States four per cent. on the purchase-money of Alaska.

(23) SARDINIA.

§ 160.

Under the treaty with Sardinia, allowing "any person holding real estate within the territories of one of the contracting parties" on whom real estate could descend but for their alienage, a reasonable time to sell such real estate etc., without paying any other taxes than those inhabitants of the country in which such real estate is situated are subject, it is still open to question whether an inheritance tax in Louisiana bears upon residents in Italy and subjects of the King of Italy who are heirs to real estate in that State.

Mr. Fish, Sec. of State, to Mr. Colobiano, February, 1870. MSS. Notes, Italy; citing State *v.* Poydrass, 9 La. Ann., 165, holding such tax to apply, and Frederickson *v.* La., 23 How., 445, where the question is left open. See as to such limitations *supra*, § 138.

(24) SPAIN.

(*a*) TREATY OF 1795.

§ 161.

The correspondence of Messrs. Carmichael and Short, United States ministers at Madrid in 1792, in reference to the Florida boundary, to Indian incursions aided by Spain, to commercial restraints, and to the navigation of the Mississippi, is given in 1 Am. St. Pap. (For. Rel.), 260, 304.

The delays of Spain in making treaty with the United States are noticed in 7 John Adams's Works, 145, 385, 389, 485, 496, 517, 520, 565, 582, 644.

The papers in respect to the negotiations by Mr. Pinckney, minister of the United States, with the Spanish ministry in 1795 are given in 1 Am. St. Pap. (For. Rel.), 535 *ff.*, together with the projects and counter-projects.

The correspondence as to the convention of August 11, 1802, is given in 1 Am. St. Pap. (For. Rel.), 625 *ff*; that connected with the boundary negotiations of 1805 in 2 Am. St. Pap. (For. Rel.), 596 *ff.* The ratification of the treaty is noticed in 2 Madison's Writings, 73, 75, 86, 94.

The 9th article of the treaty of 1795 was the subject of much discussion in the Amistad case, in 1839 and the immediately succeeding years. According to a statement of Mr. Holabird, U. S. district attorney for Connecticut, addressed, September 5, 1839, to Mr. Forsyth, Secretary of State, "certain blacks (alleged to be slaves) were taken, in June, 1839, on board the schooner Amistad at a port in the island of Cuba to transport to another port in the same island; when from seven to ten leagues out they murdered the captain and mate and took possession of the schooner (27th or 28th of June). On the 26th of August they were discovered off Montauk Point by the crew of the surveying brig Washington, commanded by Lieutenant Gedney, and by him boarded and brought into the port of New London."

Thirty-nine of the revolters were committed for trial in Connecticut, and were also "libelled" on Sept. 19, 1839, by the United States district attorney, as property of Spanish subjects, and hence to be restored under the treaty. Judge Thompson, sitting in the U. S. circuit court, decided that that court had no jurisdiction of the criminal offence charged, it having been committed on a Spanish vessel on the high seas (10 J. Q. Adams' Memoirs, 132). He refused to release the prisoners, however, as they were claimed as property under the libel filed in the district court. To the libel the negroes in arrest filed an answer to the effect that they were free-born Africans, who had been wrongfully kidnapped. The court rejected the claims of the alleged owners for the restoration of the negroes, but decreed that they should be delivered to the President of the United States for transportation to Africa. This ruling was affirmed by the circuit court, and afterwards, in 1841, (Baldwin, J., being the sole dissenter,) by the Supreme Court of the United States, (16 Peters, 518) with the modification that the negroes in question were to be declared free. The ground on which this decision of the Supreme Court is put is stated below in its proper place in this section.

See Mr. Holabird, Dist. Att'y., to Mr. Forsyth, Dec. 21, 1839; House Ex. Doc. 188, 26th Cong. 1st sess.; Senate Ex. Doc. 179, 26th Cong. 2d sess.; op. of Att'y. Gen. Grundy, 3 Op. 486; (in which opinion Mr. Grundy, in Nov., 1839, advised the President to deliver the negroes to Spain). Hastings' Am. Politics, Frank. Sq. Ed., 139; 10 J. Q. Adams' Mem., 132, *ff*, 429, *ff*, 441, narrating Mr. Adams' course as counsel for the negroes.

The owners of the Amistad subsequently made application to the Government of the United States for indemnity for the losses sustained by them through the alleged failure of the United States to comply with the treaty. Mr. Buchanan, Secretary of State, on March 19, 1846, recommended an appropriation of fifty thousand dollars for this purpose. The House refused to make such an appropriation. It was added by the Senate as an amendment to the civil and diplomatic bill. The amendment, however, did not pass the House, which, the next session, again rejected the appropriation.

See President Fillmore's message of Feb. 14, 1851, with accompanying papers. Senate Ex. Doc. 29, 31st Cong., 2d sess.

A report in the Senate, by Mr. Mason, of February 19, 1851, recommending payment of the claim, is found in Senate Rep. Com. 301, 31st Cong., 2d sess. See further message of President Tyler, recommending payment, House Ex. Doc. 191, 27th Cong., 3d sess.; House Ex. Doc. 83, 28th Cong., 1st sess.

President Fillmore's message of January 19, 1853, recommending payment of the claim is in Senate Ex. Doc. 19, 32d Cong., 2d sess.

It is stated, however, by Mr. Fillmore, that "in an elaborate letter of Mr. Webster to the Chevalier d'Argaïz, on the 1st of September, 1841, the opinion is confidently maintained that the claim is unfounded." Mr. Fillmore bases his conclusion recommending action on the message of President Polk sustaining the claim, and on reports of committees of Congress.

Article 15 of the treaty of 1795 between the United States and Spain provides that neutral bottoms shall make neutral goods, but contains no stipulation that enemy's bottoms shall communicate hostile character to the cargo. The latter is not to be implied from the insertion of the former rule.

The Nereide, 9 Cranch, 388. See, further, the Santissima Trinidad, 7 Wheat., 283.

The term "subjects" in the 15th article of the Spanish treaty of 1795, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens" or "inhabitants" when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions.

The Pizarro, 2 Wheat., 227.

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, cannot be interfered with by the courts of the United States.

The Neustra Señora de la Caridad, 4 Wheat., 497.

Article 17 of the treaty with Spain of 1795 is imperfect and inoperative so far as concerns passports, in consequence of the omission to annex the form of passport to the treaty.

The Amiable Isabella, 6 Wheat., 1.

The form of the passport by which the freedom of the ship was to be conclusively established never having been annexed to the treaty, the proprietary interest of the ship is to be proved according to the ordinary rules of the prize-court, and if thus shown to be Spanish, will protect the cargo on board, to whomsoever the latter may belong.

Ibid.

NOTE BY MR. J. L. CADWALADER.—"The form of passport referred to in article 17 of the treaty of 1795 is not annexed either to the original treaty signed by the negotiators, or to the copy bearing the ratification of the King of Spain on file in the Department of State. It is remarkable, however, that to the Spanish version, appearing in vol. 2, p. 429, of 'Coleccion de los Tratados de Paz,' &c., published at Madrid in 1800, two forms of passports in Spanish are annexed—one for ships navigating European seas, and the other for those navigating American seas. These forms are found in 6 Wheat., 97. No explanation has been discovered of these facts. It is stated, however, in a letter from Jacob Wagner to Mr. Monroe, dated November 3, 1814, that a form was agreed on."—*Cadwalader's Digest.*

The treaty of 1795 with Spain prohibited citizens of the United States from taking commissions to cruise in a privateer against the commerce of Spain, but not from serving in a public armed vessel of a belligerent nation.

The Santissima Trinidad, 7 Wheat., 283.

"The United States have never claimed any part of the territory included in the States of Mississippi or Alabama under any treaty with Spain, although she claimed at different periods a considerable portion of the territory in both of those States. By the treaty between the United States and Spain, signed at San Lorenzo el Real, on the 27th of October, 1795, the high contracting parties declare and agree that the line between the United States and East and West Florida shall be designated by a line beginning on the Mississippi River at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east from the middle of the Chattahoochee River, &c. This treaty declares and agrees that the line which was described in the treaty of peace between Great Britain and the United States as their southern boundary shall be the line which divides their territory from East and West Florida. The article does not import to be a cession of territory, but the adjustment of a controversy between two nations. It is understood as an admission that the right was originally in the United States. Had Spain considered herself as ceding territory, she could not have neglected to stipulate for the property of the inhabitants—a stipulation which every sentiment of justice and of national honor would have demanded, and which the United States would not have refused."

McKinley, J., Pollard *v.* Hagan, 3 How., 225; see Hickey's Lessee *v.* Stewart, 3 How., 760.

The treaty between the United States and Spain of 1795 ascertained and established an existing but disputed boundary-line, and prior grants made by the authorities of Spain within the territory of Georgia, as ascertained by that treaty, were invalid.

Robinson *v.* Minor, 10 How., 627.

The 20th article of the treaty with Spain of 1795 does not extend the jurisdiction of our courts to offenses committed in Spain, nor *vice versa*, and according to the common law, the commandant of the island of Amelia is not liable to any public prosecution before any of our courts for his transactions in Florida.

1 Op., 68, Lee, 1797.

Mr. John Randolph, on January 3, 1806, made a report from a special committee condemning "with just indignation the hostile spirit manifested by the court of Madrid towards the Government of the United States, in withholding the ratification of its convention with us, although signed by its own minister, under the eye of his sovereign, unless with alterations of its terms affecting claims of the United States, which, by

the express conditions of the instrument itself were reserved for future discussion, as well as other hostile acts."

2 Am. St. Pap. (For. Rel.), 695.

"From the middle of 1793 to the middle or close of 1794 the problem of preserving peace appeared to be difficult. Great Britain occupied military posts within the United States, on the northern frontier, and had pushed a garrison far south towards Cincinnati. Spain occupied Natchez, and proposed to support the Indians who dwelt within what are now the States of Mississippi, Alabama, and a large part of Georgia in maintaining their independence. The Indians in the Northwest were in open hostilities. Genet set the Administration at defiance in the Atlantic States, and appealed to the nation to support him. Washington solved the difficulty by asking the recall of Genet, by sending Jay to London, and by ordering Thomas Pinckney to Madrid with full power and authority * * * 'for and in the name of the United States to meet, confer, treat, and negotiate with the ministers, commissioners, deputies, or plenipotentiaries of his said Majesty [the King of Spain], being furnished with sufficient authority of and concerning the navigation of the river Mississippi; and such other matters relative to the confines of the territories of the United States and His Catholic Majesty, and the intercourse to be had thereon, as the mutual interests and general harmony of neighboring and friendly nations require to be precisely adjusted and regulated; and of and concerning the general commerce between the United States and the Kingdoms and dominions of His Catholic Majesty; and to conclude and sign a treaty or treaties, convention or conventions, thereon.' He also had a separate power 'to agree, treat, consult, and negotiate of and concerning all matters and causes of difference subsisting between the United States and his said Majesty, relative to the instructions of his said Majesty, or of any of the tribunals or authorities of his said Majesty, to his ships of war and privateers, of whatsoever date, as well as of and concerning restitution or compensation in the cases of capture or seizure made of the property of the citizens of the United States by the said ships of war and privateers, and retribution for the injuries received therefrom by any citizen of the United States, and to conclude and sign a treaty or treaties, convention or conventions, touching the premises.'

"Pinckney arrived in Madrid on the 28th of June, 1795. Short, who was there as chargé, had written the Government that the moment was opportune for concluding a treaty. Pinckney was met at the outset by a proposal for 'a triple' alliance between France, Spain, and ourselves, which he declined. He also declined to guarantee the Spanish possessions in America. By the 10th of August the parties began to put their ideas on paper. The first projét for a treaty came from Spain, and was handed Pinckney by the Prince of Peace before the 23d of September. On the 27th of October the parties signed a treaty, which has formed the basis of the relations between Spain and the United States from that day to this.

"It defined the southern boundary of the United States in accordance with the definitions in the treaty with Great Britain. It conceded the navigation of the Mississippi, and gave us a right of deposit and storage for our produce at New Orleans. It embodied many of the leading commercial provisions of the previous treaties with France or Prussia. And a provision was made for a commission 'to terminate all differences on account of the losses sustained by the citizens of the

United States, in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty during the late war between Spain and France.' A copy of this treaty was sent to Congress by President Washington on the 29th of March, 1796, and an act was passed to carry it into effect. Though transmitted in the midst of the debate on 'Jay's treaty,' it was considered and acted on without more than a casual allusion to it in that debate, and without discussion on its own merits.

"The provisions of this treaty respecting limits and the withdrawal of garrisons had not been carried out when Louisiana was acquired by the United States, and meanwhile disputes had arisen in consequence of the arbitrary order discontinuing the right to deposit and store American produce at New Orleans, and reclamations were made upon Spain for losses suffered from this cause, and also for maritime spoliations before the peace of Amiens."

Mr. J. C. B. Davis, Notes, &c.

"The treaty of 1795 concluded with Spain during the same Administration (of Washington), provided that the vessels or effects of citizens of either power should not be embargoed or detained by the other for any purpose; that the courts of justice should be open alike to citizens of each power; that seizures of the persons of citizens of one power by the authorities of the other, within its jurisdiction, were to be made and prosecuted under the ordinary forms of law, and that the persons so arrested were to have the right to employ such advocates or attorneys as they pleased, who were to have the right of access to them, and of being present at all examinations and trials, all of which engagements have since been entered into with other powers."

Ibid.

(*b*) FLORIDA NEGOTIATIONS AND TREATY OF 1816-'20.

§ 161*a*.

The United States having proposed in 1816 to accept a cession of Florida as a basis of the release of the claims held by citizens of the United States against Spain, offered at the same time, by way of further compromise, to take the Colorado river as the western boundary of the Louisiana purchase, although that purchase had been previously maintained to extend as far the Rio Grande. The Spanish minister, Onis, whose intrigues and turbulence had been a constant source of difficulty at Washington, insisted, in the first place, upon the restoration to Spain of that section of what was called West Florida which included Mobile and the adjacent country. He also presented as a set-off losses to Spain from depredations by expeditions which he alleged had been fitted out at New Orleans for the purpose of assisting the insurgents in Texas and Mexico; and he also claimed that vessels from the insurgent Spanish colonies should be excluded from the ports of the United States. In order to meet the latter complaints so far as they were reasonable, a statute was passed in March 3, 1816, which imposed a fine of ten thousand dollars, forfeiture of the vessels employed, and an imprisonment not exceeding ten years, on all persons engaged in fitting out vessels to cruise against powers with which the United States was at peace.

See *infra* §§ 402, 405.

The earlier correspondence with Spain relative to the cession of Florida is given in the Brit. and For. St. Pap. for 1818, vol. 6, 655 *ff.* In the same volume, p. 555, is given the President's message on the same subject. See also 2 Am. St. Pap. (For. Rel.), 626.

The correspondence as to the cession of Florida is more fully given in House Doc. 368, 18th Cong., 1st sess.; 5 Am. St. Pap. (For. Rel.), 263.

The treaty of "amity, settlement, and limits, between the United States and His Catholic Majesty," signed February 22, 1819, and sent to the Senate on that day, is given with the correspondence preliminary thereto in Senate Doc. 311, 15th Cong., 2d sess.; 4 Am. St. Pap., 422 *ff.* This treaty provided for the cession of Florida to the United States, and the reciprocal renunciation of certain claims by the contracting parties, as adjusted by a joint commission. See comments, *infra.*

This treaty was not ratified by the Spanish Government until October 24, 1820, which was after the time provided for the exchange of ratifications. It was submitted again to the Senate on February 13, 1821, and ratified by them February 19, 1821. See 5 Am. St. Pap. (For. Rel.), 127.

As to the influences on Spain temporarily to withhold ratification from the treaty of 1819, see Mr. J. Q. Adams, Sec. of State, to Mr. Lowndes, chairman, House Committee on Foreign Affairs, Dec. 21, 1819. MSS. Report Book. This question is more fully discussed at the close of this section.

As to ratification of this treaty, see *supra*, § 131. The correspondence as to execution of the treaty is in House Doc. 380, 18th Cong., 2d sess.; 5 Am. St. Pap., 368.

The treaty as finally ratified is given in House Ex. Doc. 347; 5 Am. St. Pap. (For. Rel.), 127. See also House Doc. 368, 18th Cong., 1st sess.; 5 Am. St. Pap. (For. Rel.), 263; Senate Doc. 56, 23d Cong., 2d sess.; Senate Doc. 49, 24th Cong., 2d sess.

As to 9th article, see House Doc. 67 (Treas. Dept.), 24th Cong., 2d sess.; House Doc. 14 (Treas. Dept.), 24th Cong., 1st sess.

As to impediment to execution of the ninth article of the treaty of 1819 arising from the question whether interest can be allowed on the amount awarded claimants, see President's message transmitting report of the Secretary of State, April 18, 1884, S. Ex. Doc. 158, 48th Cong., 1st sess. See, also, *infra*, § 246.

The papers relative to the delivery of Florida to the United States in 1821 are attached to the President's message of December 5, 1821, House Doc. 324, 17th Cong., 1st sess.; 4 Am. St. Pap. (For. Rel.), 740 *ff.*

Under the treaty of 1819 the commissioner had power to decide conclusively upon the amount and validity of claims, but not upon the conflicting rights of parties to the sums awarded by them.

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

"The 6th article of the treaty contains the following provision: 'The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.' This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens

of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the Government till Florida shall become a State. * * * All the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the Government of the United States. Congress recognized this principle by using the words 'laws of the Territory now in force therein.' No laws could then have been in force but those enacted by the Spanish Government."

Marshall, C. J., American Insurance Co. *v.* Canter, 1 Pet., 542.

The 8th article of the treaty taken in connection with the 2d article, and with the explanatory declaration of the King of Spain when he ratified the treaty, does not provide for grants made by the Spanish authorities between the rivers Iberville and Perdido.

Foster *v.* Neilson, 2 Pet., 253; Pollard's Lessee *v.* Files, 2 How., 602.

By the treaty Spain did not cede any territory to the United States west of the river Perdido. Acting upon the opinion that the territory claimed by Spain west of that stream was acquired from France by the treaty of 1803, the legislative and executive departments of the Government had, prior to 1819, treated it as a part of the territory of the United States, and the courts of the United States will, in such cases, follow the course of those departments.

Foster *v.* Neilson, 2 Pet., 253; Garcia *v.* Lee, 12 *ibid.*, 515; Pollard's Lessee *v.* Files, 2 How., 591; Pollard's Lessee *v.* Hagan, 3 *ibid.*, 212.

By the 8th article of the treaty of 1819, the lands theretofore completely granted by the King were excepted out of the grant to the United States; and the original of that treaty, in the Spanish language, not corresponding with the original in English, the language of the former, it being plainer and clearer upon the point in controversy, is to be taken as expressing the intent of the grantor as to the lands granted and reserved.

U. S. *v.* Arredondo, 6 Pet., 691.

The treaty of 1819 confirmed prior grants of lands in Florida by the Spanish Crown; though if such grants were conditional, and the condition was without good reason unperformed by the grantee, no title vested.

U. S. *v.* Percheman, 7 Pet., 51; U. S. *v.* Clarke, 9 *ibid.*, 168; U. S. *v.* Mills, 12 *ibid.*, 215. See *supra*, §§ 4 *ff.*

The validity of concessions of lands, conditional as well as absolute, made by the authorities of Spain in East Florida, is expressly recognized in the treaty of cession.

U. S. *v.* Clarke, 9 Pet., 168.

By the treaty of 1819 the United States acquired no lands in Florida to which any person had lawfully obtained such a right by a perfect or inchoate title, that this court could consider it as properly under the second article, or which had, according to the stipulations of the eighth, been granted by the lawful authorities of the King; which words, grants, or concessions were to be construed in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect.

Mitchel *v.* U. S., 9 Pet., 734.

Unlocated and indefinite grants by the Spanish authorities were void and not protected by the treaty of 1819.

O'Hara *v.* U. S., 15 Pet., 275; U. S. *v.* Delespine, *ibid.*, 319; U. S. *v.* Miranda, 16 *ibid.*, 153.

Under article 9 of the treaty of 1819, providing for the restoration of property rescued from pirates and robbers on the high seas, it is necessary to show (1) that what is claimed falls within the description of vessel or merchandise; (2) that it has been rescued on the high seas from pirates and robbers; (3) that the asserted proprietors are the true proprietors, and have established their title by competent proof. It was further held that native Africans unlawfully kidnapped were not "merchandise."

U. S. *v.* The Amistad, 15 Pet., 518. See prior statement of this case in this section.

All the grants of land made by the lawful authorities of the King of Spain before the 24th of January, 1818, were by the treaty ratified and confirmed to the owners of the lands. Such is the construction given to the eighth article by this court in Arredondo's case, 6 Pet., 706, and in Percheman's case, 7 *ibid.*, 51; that is, imperfect titles were equally binding on this Government after the cession as they had been on the Spanish Government before.

U. S. *v.* Clarke and Atkinson, 16 Pet., 231, 232.

It is the settled doctrine of the judicial department of the Government that the treaty of 1819 ceded no territory west of the Perdido River.

Pollard *v.* Files, 2 How., 591.

It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the laws of its own Government, and not according to those of the Government ceding it.

Pollard *v.* Hagan, 3 How., 225; *supra*, §§ 4 *ff.*

An equitable Spanish title, not confirmed by the United States, to ceded lands, cannot prevail against a legal title acquired from the United States.

U. S. *v.* King, 3 How., 773.

The treaty of 1819 contains the following stipulation: "The United States shall cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American Army in Florida." The treaty created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with Congress to provide one, according to the treaty stipulation. Undoubtedly Congress was bound to provide such a tribunal as the treaty described. But if they failed to fulfill that promise, it is a question between the United States and Spain.

U. S. *v.* Ferreira, 13 How., 45, 46.

Where one of the parties to a treaty, at the time of its ratification, annexes a written declaration explaining ambiguous language in the instrument, or adding a new and distinct stipulation, and the treaty is afterward ratified by the other party with the declaration attached to it, and the ratification duly exchanged, such distinct stipulation or explanation being duly approved by the constitutional authorities of each ratifying power, the declaration thus annexed is a part of the treaty, and as binding and obligatory as if it were inserted in the body of the instrument. Hence the grant of lands in Florida by the King of Spain to the Duke of Alagon, whether it takes date from the royal order of December 17, 1817, or from the grant of February 6, 1818, is annulled by the treaty between the United States and the King of Spain, of 1819, by virtue of the declaration to that effect made by the President of the United States on presenting the treaty for an exchange of ratifications, and assented to by the King in writing, and again ratified by the Senate of the United States. Whether the King of Spain had power to annul a grant is a question which was foreclosed in every judicial tribunal of the United States by the action of the President and Senate treating with him as having that power. Nor will the court review the action of the executive in this respect, it being impossible for the Executive Department of the Government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

Doe *v* Braden, 16 How., 635.

The claims of American citizens against Spain, for which by the treaty of 1819 the United States undertook to make satisfaction to an amount not exceeding $5,000,000, were such claims as, at the date of the convention, were unliquidated and statements of which had been presented to the Department of State or to the minister of the United States. The convention, as signed 22d February, 1819, subject to ratification within six months, though it was not ratified within the time stipulated, was never abandoned, though some expressions in the notification of August 21, 1819, by the United States to Spain (notifying to that Government that after the next day, "as the ratifications of the convention will not have been exchanged, all the claims and pretensions of the United States will stand in the same situation as if that convention had never been made") indicated that the United States might be induced to carry it into effect. The notification did not, by the non-ratification within the six months, make revocable the power which citizens of the United States, by filing their claims with it, had given their Government to make reclamations against Spain in their behalf.

Meade *v.* United States, 9 Walk., 691.

The act of Congress of June 22, 1860, had for its object the final adjustment of land claims and to validate grants made by the Spanish Government to bona fide grantees of land within the disputed territory while that Government remained in possession of the territory.

U. S. *v.* Lynde, 11 Wall., 632.

A Spanish grant made December 2, 1820, was made in violation of the 8th article of the treaty of 1819.

2 Op., 191, Wirt, 1829.

Certain slaves were shipped by their Spanish owners from Havana to Pensacola in an American vessel in violation of the laws of the United States. The vessel was captured by the American military force then occupying Fort Barrancas. Afterward, while proceeding to adjudication, the slaves and vessel were seized by a revenue vessel and carried into the port of Mobile. The vessel and cargo were condemned, but restitution of the slaves was awarded, because the original capture was not made by a "commissioned vessel of the United States." The original capture being lawful, and the slaves though restored being on board unlawfully, the Spanish owners have no claim as for an "injury" under the treaty with Spain of 1819.

2 Op., 198, Berrien, 1820.

The Department of State was made the depository, by stipulation, of the records and papers referred to in article 11 of the treaty with Spain of 1819, and they must not be delivered up to the claimants; and any law of Congress that shall authorize or require their delivery will be a violation of that treaty.

2 Op., 515, Taney, 1832.

The United States are bound, by the treaty with Spain of the 22d of February, 1819, to pay the Spanish inhabitants of Florida for slaves carried away or killed by troops of the United States prior to that treaty; and remuneration should be made for the loss of services of such slaves as have been restored.

3 Op., 391, Grundy, 1838.

The extraordinary expenses of a party, incurred in living at Saint Mary's, whither he retired after the destruction of his property in Florida, are matters too remotely consequential to be the proper subject of damages under article 9 of the treaty of 1819.

6 Op., 530, Cushing, 1854.

The power of the Secretary of the Treasury and the necessary proceedings to establish claims under the ninth article of the treaty of 1819 is considered at length in 6 Op., 533, Cushing, 1854.

Under the treaty of 1819 and the act of 1829 the apprehension and delivery of a seaman, who is alleged to be a deserter from a Spanish ship, is a judicial duty, and the State Department cannot change what a judge has done.

9 Op., 96, Black, 1857.

The action of the United States in driving buccaneers from Amelia Island, and in pursuing and punishing hostile Indians in Florida, is elsewhere detailed.

Supra, §§ 50*a*, 50*b*; *infra*, § 348*a*.

The defiant patriotism of Mr. Adams was never more conspicuously shown than during his negotiations with Spain in respect to the purchase of the Floridas, and in no part of his public life were his faults of temper, and his antagonism to any one by whom his personal ambition was thwarted, less manifest. In Congress, the policy of the Administration in respect to the Floridas was at first looked upon coldly by the rising statesmen, among whom Mr. Clay took the lead, whose primary object was early recognition of South American independence. Florida would be valuable, but it would, in any view, be one of the prizes of a war with Spain which they expected as a necessary and not undesirable consequence of the interposition in South America they proposed. In support of the Administration, in delaying the recognition of the South American insurgents, were rallied several powerful agencies: (1) The commercial interests of the North, which deprecated a war which would expose their ships to Spanish privateers; (2) the Southeastern Atlantic States, of whom Mr. Forsyth was the leading spokesman in Congress, who desired to be relieved from border collisions by purchasing the Floridas at once; and (3), General Jackson, who here displayed that rare sagacity which afterwards so singularly came to his aid in mastering not only the opposition of others, but the impulse of his own passions. His personal instincts were for a Spanish war, and so his private unpublished letters; on file in the Department of State, show. He burned with resentment at what he considered Spanish atrocities which he thought were all the more injurious from the feebleness of the power by which they were upheld. He was ready to seize and occupy Pensa-

cola and other posts which he thought harbored border Indians or hostile raiders (*Supra*, § 50*b*.) But while thus making the United States as uncomfortable a neighbor to Spain as he could, underneath all his correspondence with the Spanish authorities, lurked the suggestion, "how much better for you to sell out." And purchasing he urged on the Administration as far wiser, surer, and cheaper than conquering.

Mr. Adams's diary explains the annoying vicissitudes to which the negotiation was subjected. It is due to him to say that in no portion of his diplomatic correspondence by which the archives of the Department of State is enriched, did he display more vigor and at the same time less impatience and harshness of expression, than in the remarkable papers which issued from him during this protracted negotiation with Spain. Of Onis, the Spanish minister at Washington, notice has been already incidentally taken in this work. It is sufficient here to say that looking upon the United States with a jealousy and dislike which he was so little able to repress that for some time his reception by the Government was refused, his diplomatic subtlety made him, when he entered at last on the negotiation, a fit instrument of the procrastination his instructions advised. When, however, cession of some sort became at last the only alternative to war, and when it was clear that Onis's past conduct and present temper precluded him from successfully concluding the negotiation, the French minister, De Neuville, whose tact and kindliness were recognized by both interests, was called upon to intervene. A compromise was through this agency effected. The Louisiana boundary was settled by following the Sabine, Red, and Arkansas Rivers to the south, as far westward as the 42d degree north latitude, and pursuing that degree to the Pacific Ocean. The spoliations claims held by the United States against Spain were renounced, and the United States undertook "to make satisfaction for the same to an amount not exceeding five millions of dollars." By this treaty, which was at once unanimously ratified by the Senate, the Floridas were supposed to be secured, as well as the disputed southwest boundary settled. Congress, having no doubt of the assent of Spain, passed, just on the eve of its adjournment, acts authorizing the establishing of local governments in the territory so won.

But the assent of Spain was withheld, as Mr. Adams, with rising impatience and indignation, narrates in his diary and protests against in his correspondence. This refusal to accede to the treaty was caused in part by the dilatory temper of Cevallos, the Spanish prime minister, who was swayed to and fro by two conflicting policies—that of relieving his government from the urgency of the spoliation claims, and that of national pride, swelled with resentment at the menacing tone assumed by the United States military authorities on the Florida border, and at the avowed sympathy of a large part of the population of the United States with the insurgents in the Spanish South American colonies. Nor was the dissatisfaction with the treaty, when its provisions were fully understood by the public, limited to Spain. It is now well known that Mr. Adams maintained that the Rio Grande was the true southwestern boundary of the United States, and that he was overruled by a majority of the Cabinet, who concurred with Mr. Crawford in holding that Florida was so essential to the Southeastern States that the movement to obtain it should not be clogged by debatable demands for territory to the southwest. But even then there were statesmen, among whom was Mr. Clay, who, with the interests of the Mississippi Valley at heart, held that Texas was not only far more valuable and important

to the United States than Florida, but that Texas already rightfully belonged to the United States. Whether General Jackson, who was appealed to by Mr. Adams for support on this issue, agreed with Mr. Adams as to making the Rio Grande the boundary, has been much disputed. Many years afterwards, when the annexation of Texas was opposed by Mr. Adams as an undue extension of slave territory, he produced his diary to show that General Jackson had advised its surrender by President Monroe. This was emphatically denied by General Jackson. The manuscript correspondence on file in the Department of State leads us to an intermediate position. General Jackson, when the Florida treaty was under consideration, approved of it as affording a settlement greatly to be preferred to a continuance of the border and Indian warfare which then existed on the Florida lines, or to a war with Spain which might be of indefinite duration and cost; and in view of what appeared to him the overwhelming importance of this issue he overlooked that of the southwestern boundary. There is nothing to show that the nature of our title to Texas, surrendered by the Florida treaty, was at that time brought to his notice. To President Monroe, however, the strength of this title was well known, and his voluminous unpublished correspondence shows with what conscientious and patient care it was considered by him. The ultimate annexation of Texas to the United States he seemed to consider as inevitable, and he declared over and over again that he would not permit it to be held by any European power but Spain. But the Missouri question was then looming portentously before his anxious eyes. He saw a great party in the North which was opposed to any extension of slave territory; he himself was no enthusiastic defender of slavery. If Texas had then been won, it could only have been brought into productive occupancy by slavery, affording a new stimulus to a surreptitious slave trade. In the course of time the dominant race of the North would flow down into it and take possession of it and occupy it, but that time had not yet come. It was better not to press a claim now for a territory for which we were not quite ready, when the effect might be to impede our acquisition of a territory which we needed at once. It is remarkable that this view of the acquisition of Texas was not shared by Mr. Adams, in whose mind the dangers of the extension of slavery had not yet become such as to influence his political course. He not only urged the assertion of our title to Texas, necessarily then a slave State, but he assented to the Missouri compromise, which gave the Southwest to slavery. The issue, in fact, was fraught with consequences which Mr. Monroe was the only leading statesman of his day to foresee. Texas, which would have then made six States of the size of Pennsylvania, would have been brought into the Union, and with the population which would soon have poured into its fertile plains, might have rivaled the Northwest as a field for pioneer settlement. Whatever might have been the effect of this on the future, in the final struggle with slavery, there is no question that the introduction of such an element of contention at that time would have been to expose the work of maintenance of the Union, which Mr. Monroe considered to be his especial charge, to perils he was unwilling to encounter.

When the treaty for the purchase of Florida had been ratified by the Senate, Mr. Forsyth was sent with it to Spain, and almost at the same time Onis, whose relations to the United States had never, as has been seen, been cordial, returned to join the ministry at Madrid. Ferdinand's change of attitude may be explained by this change in his ad-

visers. He had consented to the Florida negotiation under the impression that while it was pending South American independence would not be recognized. But Onis was convinced that when Florida was ceded South American independence would be recognized; and this conviction was easily communicated to both King and Cortes. Even the concession of Texas, unduly liberal as it was, did not relieve Spanish suspicions, since a filibustering invasion of Texas by adventurers who, though acting in contempt of Federal authorities, yet came from the United States, left the impression that after Florida was obtained by treaty, Texas would have to succumb. Had the Spanish Government, no matter for what motives, promptly disavowed the treaty as made in excess of instructions, the United States would have had no ground for substantial complaint, no matter what might have been the reasons for such disavowal. But this the Spanish Government did not do. It is a principle of diplomacy that such disavowal should be prompt; no complaint came from Spain until seven months had passed. The announcement, after that period, that Spain meant to repudiate a bargain which the United States had taken every intermediate step to fulfill, naturally awakened in the minds of Mr. Monroe and of his Cabinet indignation as well as surprise. At first, as we are told in Mr. Adams' contemporaneous diary, the impulse was to occupy Florida, not merely on treaty grounds, but on ground of necessity, to repel the raids of Indians and Spanish marauders which had their base in Florida. Spain, it was argued, has neither the power nor the will to keep Florida from being the starting ground for these outrages; it is necessary that the United States take the matter in its own hands. So urged Mr. Crawford, whose State (Georgia) was peculiarly exposed to these incursions; so at first felt Mr. Adams, incensed that the treaty with which his fame was identified should be repudiated. Mr. Monroe at the time yielded to this impulse, but after consideration he concluded to recommend, not immediate occupation, but occupation in the future, dependent on the action of Spain. The Spanish Government, on receipt of this message, felt that some excuse was due for its delay, and it found it in the allegation that an alteration had been made in the treaty after signature. But this allegation was readily disproved, its sole basis being that, after signature, Mr. Onis, being shown an ambiguous phrase in the treaty as to certain Florida grants, answered that the phrase was inadvertent, a matter not of change, but of subsequent explanation and construction.

When the message advising a delay in action came before the Committee on Foreign Relations in the House of Representatives, that committee, taking ground in advance of the President, reported a bill making it incumbent on the President to take immediate possession of Florida. But in the mean time it was found that Great Britain and France looked with anxiety on Spain's dallying with her international obligations to the extent she proposed, and at the consequences of a war between Spain and the United States, which might result in giving to the United States Cuba and Texas. They remonstrated with Spain, and the result was a new minister from Spain, General Vivès, who arrived in Washington early in April, 1820. But Vivès had hardly entered on his duties before news arrived from Spain that by a revolutionary movement the prior reactionary ministry had been overthrown, and the liberal constitution, adopted on the expulsion of the Bonapartes, had been restored. Vivès, whose instructions by Ferdinand had been merely to temporize and delay negotiations, found himself in this way virtually

without any instructions at all; and Mr. Monroe, unwilling to take advantage of such a moment of paralysis, advised such a modification of the committee's resolution as would enable him to reserve immediate action. Vivès, informed by the Department of the importance of early action, pledged himself, in May, 1820, to obtain a prompt decision from his Government. This being understood, the House suspended proceedings, and Congress adjourned on May 15, to meet on November 13.

In October the Spanish Cortes met, and the injustice as well as the danger of further procrastination having become evident, the final ratification of the treaty was agreed to. Five months elapsed, however, such was the slowness of communication in those days, before the treaty reached Washington. The period was one suitable for the acceptance of a policy of peace. The unanimous re-election of the President had just been officially announced. The settlement of the Missouri question, by which the country had been convulsed, was at least, by the proposition by Mr. Clay of a joint committee of compromise, made probable. It was necessary to re-submit the treaty to the Senate, as, by non-ratification within the time limited, it had expired. But it was approved anew by a large majority, and the House being asked on February 22, 1821, to give its assent to the necessary legislation, promptly responded. Mr. Monroe, true both to his nature and his public statements, continued, notwithstanding both the provocation and the opportunity, to maintain the same policy of patience towards Spain which he had previously exhibited. The House, notwithstanding its more ardent action of a prior session, now contented itself with passing a resolution to the effect that it would support the Administration should the latter see fit to recognize the independence of the South American States; and Mr. Monroe sent a message in reply, in which he stated that while he had recognized the insurgents as belligerents, he considered it best to delay still further the recognition of their independent sovereignty. (See on this topic further, *supra*, § 70.) But in point of fact, Mr. Monroe's course, while maintaining unwaveringly the strict principles of neutrality of which the United States had been the first consistent exponent, gave the insurgents as much support as they could rationally, consistently with international law, have asked. Their ships were invested with belligerent rights; Spain was informed she would not be permitted to treat them as pirates, and they were allowed, under the usual restrictions, to purchase contraband of war. But it is due to Mr. Monroe to say that his non-recognition of South American independence was not one of the conditions of his purchase of Florida, nor did the consummation of that purchase at all alter the course he had determined on of delay in such recognition until the fact of independency had been substantively established.

As to the action of the courts under Spanish grants in Florida under the treaty of 1819, see Foster *v.* Neilson, 2 Pet., 253; Delassus *v.* U. S., 9 Pet., 117; U. S. *v.* Arredondo, 6 Pet., 691; U. S. *v.* Percheman, 7 Pet., 51; and cases cited *supra*, §§ 4, 5 *ff*, and also in prior pages of this section.

As to duty of ratification under such circumstances see *supra*, § 131.

The protocol of January 1, 1877, between Mr. Cushing, minister to Spain, and Mr. Calderon y Collantes, Spanish minister of state, as to modes of criminal procedure in Spain and the United States, is given *infra*, § 230; see also *supra*, §§ 131, 131*a*.

House Doc. 36, 22d Cong., 2d sess., gives "extracts from Solorzano's Politica Indiana, a work of approved authority in all Spanish tribunals, and the most celebrated of the Spanish commentaries on the laws

of the Indies. The translations compared and certified by the translator of foreign languages in the Department of State."

As to treaty of St. Ildefonso, see 2 Am. St. Pap. (For. Rel.), 627 *ff.*

Questions concerning intervention in Cuba are discussed *supra*, § 60.

As to Spanish spoliations, see *infra*, § 228.

"The aggressions on the commerce of the United States in the wars between Spain and her revolted colonies continued to give rise to claims against that power. The nature of these claims is described by Mr. Van Buren in his instructions of October 2, 1829, to Mr. Van Ness, the minister to Madrid. He instructed Van Ness to secure either the payment of a gross sum in full satisfaction, or the appointment of a mixed commission. The negotiations extended through a period of between three and four years. At first Spain declined to recognize liability, but after the death of Ferdinand it was agreed that Spain was liable, and that the United States should receive in full satisfaction twelve millions of rials vellon, in inscriptions, the interest at five per cent., to be payable in Paris. This agreement was carried out in the convention of 1834.

"When the bill to carry this treaty into effect came before the House, Mr. Cushing said 'that he desired to avail himself of this occasion to express his strong sense of the justice and honor exhibited by the Government of Spain in the treaty of which this bill was the consummation. In the midst of national calamities, which she met with her characteristic fortitude, with a deadly civil war raging in her bosom, and weighed down with financial embarrassments, Spain has acknowledged and satisfied the claims of our citizens, in a spirit of manly promptitude and frankness, strikingly contrasted with the conduct of some other European powers in similar matters.' The act was passed June 7, 1836, and its operation was afterwards extended for a limited time.

"The long continuance of the internal condition described by Mr. Cushing caused a suspension of payments due under this treaty. In his message to Congress of December 7, 1841, President Tyler said, 'The failure on the part of Spain to pay with punctuality the interest due under the convention of 1834, for the settlement of claims between the two countries, has made it the duty of the Executive to call the particular attention of that Government to the subject. A disposition has been manifested by it, which is believed to be entirely sincere, to fulfill its obligations in this respect, so soon as its internal condition and the state of its finances will permit.'

"'Mr. Buchanan, when Secretary of State, agreed to receive an annual payment of $30,000 at Havana in full of the interest of the principal provided for by the convention, less fifteen hundred dollars for what was called prompt payment. * * * When the payment of 1862 was about to be made, the question arose whether it should be demanded in coin, or whether we were bound by the act of Congress of the 25th of February, 1862, to accept the same in current money of the United States. The latter alternative was reluctantly acceded to.'

"Many and delicate questions arose between the United States and Spain during the years that elapsed between the treaty of 1834 and the outbreak of the insurrection in Cuba in 1868; questions which taxed the skill and forbearance of statesmen on both sides. But they did not concern the construction or the operation of existing treaties between the two powers.

"In contending with this insurrection, the Government of Spain conceived it necessary to issue decrees suspending the right of alienating property, and embargoing the property of some citizens of the United States, who were suspected of being connected with the insurgents. Mr. Fish called attention to the fact that the enforcement of such decrees against citizens of the United States and their properties might be regarded as violations of the 7th article of the treaty of 1795. As had been foreseen, many complaints arose, which, on the 9th of June, 1870, Mr. Fish brought to the attention of the Spanish minister in Washington, saying, 'It appears to the President that the sweeping decrees of April, 1869, have been put in operation against the properties of the citizens of the United States, in violation of the treaty agreement that such property should not be subject to embargo or detention for any public or private purpose whatever. * * * It is understood that the citizens of the United States whose properties have been thus forcibly taken from them have not been allowed to employ such advocates, solicitors, notaries, agents, and factors as they might judge proper; on the contrary, as this Government has been informed, their properties have been taken from them without notice, and advocates, solicitors, notaries, agents, or factors have not been allowed to interpose in their behalf. * * * The undersigned has also received representations from several citizens of the United States, complaining of arbitrary arrest, and of close incarceration without permission to communicate with their friends, or with advocates, solicitors, notaries, agents, and factors, as they might judge proper. * * * In some cases, also, such arrests have been followed by military trial, without the opportunity of access to advocates or solicitors, or of communication with witnesses, and without those personal rights and legal protections which the accused should have enjoyed. * * * What has been already done in this respect is unhappily past recall, and leaves to the United States a claim against Spain for the amount of the injuries that their citizens have suffered by reason of these several violations of the treaty of 1795.'

"The subject was referred to Madrid, where, after some correspondence, the agreement of February 12, 1871, was concluded.

"Under this agreement the United States presented a claim, on behalf of a person who had declared his intention to become a citizen, but had not yet become one. The Spanish agent objected that it did not come within the scope of the treaty. The two national commissioners being unable to agree upon this question, it was referred to the umpire, Baron Lederer, by whom it was decided adversely to the United States."

Mr. J. C. B. Davis, Notes, &c.

(25) SWEDEN AND NORWAY.

§ 162.

President J. Q. Adams's message of February 7, 1828, communicating to the Senate a treaty of commerce and navigation between the United States and His Majesty the King of Sweden and Norway, concluded at Stockholm on the fourth of July, 1827, and ratified January 18, 1828, is given in House Doc. 471, 20th Cong., 1st sess., 6 Am. St. Pap. (For. Rel.), 829.

The 6th article of the treaty with Sweden of 1783 is understood as applying to personal property alone.

1 Op. 275, Wirt, 1819.

By virtue of article 2 of the treaty with Sweden, of April 3, 1783, and articles 8 and 17 of the treaty with Sweden and Norway of July 24, 1827, the provisions of article 4 of the treaty with Belgium of July 17, 1858, exempting steam vessels of the United States and of Belgium, engaged in regular navigation between their respective countries, from the payment of tonnage and certain other duties, became immediately applicable, *mutatis mutandis*, to steam navigation between the United States and Sweden and Norway.

14 Op., 468, Williams, 1874.

"The treaty of April 3, 1783, was concluded with Sweden by Dr. Franklin as American plenipotentiary, on the request of that power. On the 12th of August, 1782, he writes from Passy to Robert Livingston: 'All ranks of this nation appear to be in good humor with us, and our reputation rises throughout Europe. I understand from the Swedish embassador that their treaty with us will go on as soon as ours with Holland is finished; our treaty with France, with such improvements as that with Holland may suggest, being intended as the basis.' On the 17th of December he writes: 'The Swedish embassador has exchanged full powers with me. I send a copy of his herewith. We have had some conferences on the proposed plan of our treaty, and he has dispatched a courier for further instructions respecting some of the articles.'

"On the 7th of March, 1783, he writes Livingston: 'I can only send you a line to acquaint you that I have concluded the treaty with Sweden, which was signed on Wednesday last. * * * It differs very little from the plan sent me; in nothing material.' The treaty, in fact, bears date April 3, 1783."

Mr. J. C. B. Davis, Notes, &c.

"Sweden is the only power in Europe that voluntarily offered its friendship to the United States. Without being solicited, proposals were made for a treaty before the independence of the colonies was recognized by Great Britain. A general authority was given to the commissioners abroad, Franklin, Adams, Jay, and Laurens, to conclude treaties of amity and commerce, but in the early part of the Revolutionary war Congress did not direct applications specially to be made to any of the northern powers, and most of the other courts to whom agents were sent either refused to receive them or contrived, under some pretext or other, to avoid all appearance of giving aid or countenance to the American Confederacy. This caution or indifference cannot be matter of censure or surprise. Few European courts probably thought, at the commencement of the Revolution, that the colonies could prevail. Few chose to take the risk of involving themselves in a maritime war with England. With the name of colonies weakness and subjection were then naturally associated. The conduct of Sweden was marked with frankness and with a very friendly character. America could not expect much aid from that country, or suppose that her example could have a great deal of influence on other nations. But it was highly gratifying that a state renowned as Sweden always has been for the bravery and love of independence of her people should manifest a sym-

pathy in the arduous struggle for liberty in a distant country. The proposal for a treaty was entirely unsought for on the part of Congress. The only account we possess of the transaction is in one of the letters of Dr. Franklin. The Swedish minister at Paris, the Count de Creutz, called on him toward the end of June, 1782, by the direction of his sovereign, Gustavus III, to inquire if he was furnished with the necessary powers to conclude a treaty with Sweden. In the course of the conversation he remarked 'that it was a pleasure to him to think, and *he hoped it would be remembered*, that Sweden was the first power in Europe which had voluntarily offered its friendship to the United States without being solicited.' Dr. Franklin communicated the application of the Swedish envoy to Congress, and instructions were shortly after sent him to agree on a treaty. The treaty was concluded at Paris on the 3d of April, 1783, by Dr. Franklin with the Count Gustavus Philip de Creutz, and in its provisions it resembles others made with the powers of Europe at that time. This is the only treaty we had with that country till 1816, but the most friendly relations, however, have been always maintained."

1 Lyman's Diplomacy of the U. S., 447 *ff.*

(26) SWITZERLAND.

§ 163.

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

Mr. Evarts, Sec. of State, to Mr. Fish, Sept. 26, 1879. MSS. Inst., Switz.

Under the convention for extradition between the United States and Switzerland, it is sufficient if the crime be subject to infamous punishment where it was committed.

In re Francois Farez, 7 Blatch., 345.

Article 1 of the treaty of 1850, providing that citizens of the United States shall be at liberty to prosecute and defend their rights before courts of justice in Switzerland in the same manner as native citizens, gives the right to maintain an action against the Government as such right is given to citizens of Switzerland.

Lobsiger's Case, 5 C. Cls., 687.

The treaty stipulation in respect to aliens taking title to real estate is noticed in other sections.

Supra, § 138; *infra*, § 201, citing Hauenstein *v.* Lynham, 100 U. S., 488.

(27) TRIPOLI.

§ 164.

The treaty with Tripoli, giving our consuls jurisdiction of litigation between citizens of the United States, does not cover cases in which both parties are such citizens.

Mr. Clayton, Sec. of State, to Mr. McCauley, Sept. 27, 1849. MSS. Inst., Barb. Powers. See as to Barb. Powers, *supra*, § 141*a*; as to Turkey, *infra*, § 165. As to Mr. Barlow's Barbary negotiations, see *supra*, § 141*a*.

(28) TURKEY.

§ 165.

"The correct meaning of the fourth article of the treaty of 1830, between the United States and Turkey, has for some time past been under consideration here. The various translations of the Turkish original of that article made at Constantinople and in this country have been carefully compared, and the conclusion arrived at is that the English version, upon the faith of which the treaty was ratified by the Senate and the President of the United States, is erroneous. According to that version a citizen of the United States who may have committed a misdemeanor or a crime in Turkey against a Turk, or against the Turkish Government, cannot be arrested even on *mesne* process, or imprisoned by the local authorities, and if tried therefor, this must be by the United States minister or consul.

"Considering the virtual impunity which such a stipulation as this bestows upon evil-disposed citizens of the United States, in that country, it is unaccountable that no more serious distrust of the accuracy of the translation should have been entertained than the archives of the Department disclose.

"The history of that translation appears to be as follows:

"Mr. Charles Rhind, who as a special agent of the United States, proceeded to Turkey in 1829, for the purpose of negotiating the treaty, employed, on arriving at Constantinople, one Navoni as his dragoman. A French version of the Turkish by this Navoni, and another in the same language by another hand, accompanied the original treaty sent hither by Mr. Rhind. It is presumed that neither of these versions was entirely satisfactory to Mr. Van Buren, then Secretary of State, for, pursuant to his direction, Mr. William B. Hodgson, then employed in the Department, and afterwards its official translator, made another translation, which purports to have been from the original Turkish. It is, however, obvious on inspection that Mr. Hodgson's translation is not from the Turkish original, but seems to be compounded from the two French versions above referred to, both of which err, as alleged by the Turkish Government, and as the other translations recently made plainly show.

"If reasonable weight be allowed to the objection of the Turkish Government that it could not have been, and was not their intention to have placed United States citizens, offenders in Turkey, on a more favorable footing than citizens or subjects of other countries, it is obvious that this objection is decidedly at variance with the English version of the 4th article of our treaty as approved by the Senate, and proclaimed by the President of the United States. The English translation of the 7th article has also been pronounced defective by that Government, as its correspondence with your predecessor, Commodore Porter, will show.

"Ambiguities and inaccuracies of this character respecting such important instruments are to be deplored; every proper effort should be made to avoid them, and when brought to light they should be corrected.

"The President cannot take it upon himself to determine whether the Senate would or would not have advised and consented to the ratification of the treaty had it been understood in the sense which we are now satisfied that it bears, nor is he disposed, without the advice of the Senate, either to promulgate a new and correct translation or to ask the Government of Turkey to enter into a new treaty, conforming to the English version which was proclaimed by President Jackson. He has therefore determined to submit the facts to the consideration of the Senate and await its resolution before inaugurating any diplomatic action. You are instructed in the mean time to avoid, and direct our consular officers to avoid, making any issue the maintaining of which depends upon the English versions of the 4th and 7th articles of the treaty which is contained in our statutes, or drawing in question the construction which the Government of Turkey puts upon the original document."

Mr. Fish, Sec. of State, to Mr. Morris, Oct. 9, 1869. MSS. Inst., Turkey; For. Rel., 1870.

The correspondence which preceded this treaty is given in Senate Confidential Ex. Doc. E, 41st Cong., 2d sess.

"I have no hesitation in confirming the conclusion reached by my distinguished predecessor on the 19th of October, 1869, 'that the English version, upon the faith of which the treaty (of 1830) was ratified by the Senate and the President of the United States, is erroneous.'"

Mr. Evarts, Sec. of State, to Aristarchi Bey, Dec. 18, 1877. MSS. Notes, Turkey.

But "this translation was nevertheless the faithful reproduction in substance of the purposes of the American plenipotentiaries, and as such received the sanction of the Senate and the President of the United States, and thus became for this nation the binding law whose precepts may not be unheedingly disregarded," and the English translation, though technically inaccurate, reflects the spirit of the negotiation and treaty.

Ibid.

"It is granted that the present official translation, on the faith of which the Senate advised and consented to the ratification of the treaty, is erroneous. But until it is fully replaced by a version having the sanction of mutual consent, it is not competent for the Senate to revoke or revise its previous decision, or for the President to disregard the existing statute. Suspension of the effect of the controverted clause, pending an adjustment, is the extremest limit to which the Executive power can go."

Same to same, Mar. 30, 1878; *ibid.*

"I am directed, in the first place, by the President to admit, on the part of the Government of the United States, that the United States are bound by the Turkish text of the treaty of 1830, which was signed in that text alone. I make this admission the more cheerfully in view of your repeated assurances, in the name of your Government, that not only shall the true intent of that text be observed, but also that the citizens of the United States within Ottoman jurisdiction shall have the treatment accorded to the citizens or subjects of the most favored nation, either by treaty or by virtue of existing local laws or customs."

Same to same, May 14, 1880; *ibid.* See on this topic, same to same, June 26, 1880; *ibid.*

The arrangement of 1884 with Turkey as to the sale of books in Turkey constitutes an international understanding not to be set aside by either party, unless for good and sufficient reason.

Mr. Frelinghuysen, Sec. of State, to Mr. Heap, Jan. 10, 1885. MSS. Inst., Turkey.

"I have the honor to acknowledge the receipt of your note of the 26th ultimo, concerning the true interpretation of article 4 of the treaty of 1830, between the United States and the Ottoman Porte, in so far as it concerns the treatment of American citizens accused of crime in Turkey.

"It appears to be your desire to avoid the extended discussion of details which has attended the question for several years past, and treat it in its most practical aspects. To that end you confine your representations to certain elementary considerations which, if I rightfully understand your note, you regard as conclusive in themselves and as rightly sufficient to have closed the controversy before now, under the instructions given to the United States minister at Constantinople to examine and settle the facts.

"This Department is equally desirous to avoid traveling anew the path of previous argument. The matter seems to it to be one readily restricted to precise limits within which it might have been determined at any time in the past fifty years if your Government had met the real issue by a positive statement of the precise meaning of the Turkish text of the fourth article in dispute.

"A part of your argument appears to rest, permit me to say, on a fallacious assumption. You go back to Mr. Porter's declaration in 1831 that the Turkish text should be the standard in case of doubt as to the meaning of the treaty, and you next quote (with some verbal inaccuracies) the words of Mr. Evarts in his note of May 14, 1880, as follows: 'I am directed by the President to admit, on the part of the Government of the United States, that the United States are bound by the Turkish text of the treaty of 1830, which was signed in that text alone. I make this admission the more cheerfully in view of your repeated assurances in the name of your Government that not only shall the true

intent of that text be observed, but also that the citizens of the United States within Ottoman jurisdiction shall have the treatment accorded to the citizens or subjects of the most favored nation, either by treaty or by virtue of existing local laws or customs,' both of which you take as showing that 'the United States Government, yielding to evidence, finally adhered, it is true, *in principle to the view taken* of this question by the Sublime Porte.' You surely do not wish to be understood as claiming that an admission of the Turkish text as the standard is equivalent to a blind acceptance of the interpretation which the Porte may see fit to give to that text, where the language itself is ambiguous. As Mr. Bancroft Davis, then Acting Secretary of State, had the honor to inform Aristarchi Bey on the 30th of December, 1881, 'The President has not intimated a purpose of yielding to the Ottoman construction of the treaty of 1830, or of abandoning in any way what he regards as the just rights of the United States.'

"The simple question is now, and always has been, what was the meaning of the treaty of 1830? In other words, what did it stipulate for American citizens in Turkey in 1830?

"You are doubtless familiar with the precedent correspondence, and will therefore recall without difficulty the many occasions on which this Government has asked that of Turkey to furnish an intelligible paraphrase of the disputed article, and to explain what was the usage toward other Franks in 1830. Not the slightest attempt to enlighten this Government on those two all-important points has been made.

"The treaty was negotiated, as you are aware, in the French tongue. The commissioners agreed upon a text in French, embracing certain stipulations. The reports of the negotiations which accompanied the text showed the occasion for those stipulations and their nature. With regard to the clause in dispute, forbidding the arrest and imprisonment of American citizens by the local judges, and leaving to their ministers or consuls the power to punish them, as in the case of other Franks, the negotiators remarked that this clause was not always strictly observed in the case of other Franks; that the Turkish authorities in 1830 frequently arrested Franks, who were thereupon demanded and obtained with difficulty by the foreign ministers. There seems to have been no doubt in their minds as to the extent of the stipulated privilege. The French text, so agreed upon, was accepted by the Turkish negotiators, and the American negotiators were thereupon furnished by the Turks with a version in the Turkish language, which they were assured was a faithful equivalent of the French text agreed upon.

"If, under these circumstances, the effect of translation was to occasion differences between the two texts, it would seem to be due to translation from French into Turkish. However this may be, they could have been verbal merely, for to suppose that, under the assurance of equivalence, a Turkish text was submitted radically different from the French text agreed upon, would be to impute something very like bad faith to

the Turkish negotiators—an imputation which this Government has no desire to make.

"The Turkish Government denies absolutely the existence in the Turkish text of certain phrases found in the English text. It says: 'The words "*they shall be tried by their minister or consul and punished according to their offense*" no more exist in the text than the words "*they shall not be arrested.*"'

"Omit these words and the remaining text becomes utterly meaningless. Nothing whatever is stipulated save the usage observed toward other Franks. This must be more than 'merely the effect of translation.'

"This Department possesses twenty or more translations from the original Turkish text, made by eminent scholars and impartial experts. All these versions, without exception, contain phrases closely following those which the Porte says do not exist at all, and all, despite wide verbal differences (merely the effect of translation), agree in stipulating that no American citizen shall be imprisoned in a Turkish prison, but shall be punished through the instrumentality of his minister or consul.

"The inference is irresistible that something of the nature of an extraterritorial privilege was stipulated, and that the words on which your Government lays such stress—'following in this respect the usage observed towards other Franks'—are simply explanatory. They refer merely, by way of illustration, to a well known state of things existing in 1830, when, as Mr. Rhind shows, all the foreign ministers successfully resisted the occasional mistaken effort of a Turkish officer to arrest Frankish subjects. They do not contain by limitation the whole of the concession.

"Moreover, this explanatory clause as to the treatment of other Franks was clearly not intended, in 1830, to subject American citizens for the future to whatever changes might thereafter supervene in the Turkish treatment of other Franks. The stipulation was meant to rest on a solid basis, not on a delusive quicksand, shifting with each varying provision of Turkish law. This is evident when we remember that in 1830 there were no tribunals to which foreigners were amenable, and that the system of jurisprudence to which the Porte claims that American citizens are to be subjected originated long after the treaty of 1830.

"The Turkish ground as to the judicial treatment of Franks changes every year. One example will suffice. In the past correspondence the Porte and its representative here have repeated with the most solemn asseverations the assurance that the treaty in the Turkish text distinctly reserved to our ministers and consuls the sole right to *imprison* American citizens even in pursuance of a Turkish judgment whose validity we have denied, and yet, recently, an American citizen, Dr. Pflaum, has suffered *imprisonment* in a Turkish prison by virtue of a Turkish judicial sentence.

"I may recognize a desire on the part of the Porte to bring the treatment of all Franks under the provisions of its recent judicial legislation; but this desire is limited in its effects by treaty rights. It would appear to be the intention of the Porte to eliminate from the last part of article 4 of the treaty of 1830 all that enunciates any specific privilege, and leave only a vague favored nation clause, whereby American citizens shall receive the most favorable treatment which for the time being may be accorded to any other Frank. This a very narrow result. We are willing to regard the phrase touching the treatment of other Franks as having some of the quality of a most favored nation clause; that is, if any other Franks have a more favored treatment than that specifically stipulated in our treaty, an American citizen might rightly claim such extension of favor. But it is not in itself a most favored nation clause, nor does it stand alone, independent of the specific stipulations of the article in which it is found.

"In every aspect of the case there are two vital considerations: first, the true meaning of the text of the treaty, and, secondly, the treatment of Franks in 1830, when the treaty was signed. As to both of these our efforts to obtain a distinct declaration from the Porte have failed. Our last attempt to obtain the needed light on the subject has been completely ignored. An instruction, No. 44, of March 3, 1882, was sent to Mr. Wallace, summarizing the whole situation in the frankest spirit and with the sole desire to put an end to this controversy. On the 29th of October, 1882, Mr. Wallace communicated a copy of that dispatch to his excellency Said Pasha, the Porte's minister for foreign affairs. No answer has been made. As I infer from your note of April 26, 1884, that you are not even aware of the existence of my communication of March 3, 1882, I send you a copy thereof for your information, omitting the inclosures, which, as you will see, are of record in your legation.

"I write you this from a courteous desire that you may fully comprehend the situation, not with any purpose of transferring the discussion back to Washington for speculative and impractical discussion. As I said in my note to Aristarchi Bey, of August 29, 1882, 'General Wallace is in a position, under the instructions heretofore sent to him, to respond to any proposal or argument which his excellency the minister for foreign affairs may see fit to address to him.'"

Mr. Frelinghuysen, Sec. of State, to Tevfik Pasha, May 31, 1884. MSS. Notes, Turkey; For. Rel., 1885.

As to questions of interpretation when there are conflicting versions, see U. S. *v.* Arredondo, 6 Pet., 601, cited *supra*, § 133.

"I have had the honor to examine the *note verbale* dated the 30th August last, and handed by you to the Acting Secretary of State, Mr. Davis, on that date. You therein review, from the position held by the Government of the Porte, the pending questions between the two countries concerning the duration of the effects of the treaty of 1862, and communicate the declaration made to the chargé d'affaires of the

United States at Constantinople, that, considering the treaty as no longer having any legal force, the Sublime Porte will levy an ad valorem duty on American goods introduced into Turkey. And you conclude by stating the desire of the Porte that the United States legation at Constantinople be directed to appoint delegates for the purpose of negotiating a new treaty and a new tariff.

"I have noted especially the concluding words of your *note verbale*, that 'it is impossible for the Imperial Government to recede from the position which it has taken in relation to this question.'

"I regret to see in this communication an apparent departure from assurances repeatedly made by the Government of the Porte, both at Constantinople and through its representatives in this capital, that the goods and citizens of the United States should receive in any contingency the treatment of the most favored nation. The proposals heretofore made by us to continue such treatment while negotiating a new treaty were based on these assurances of Turkey.

"As relates to these assurances, I need scarcely do more than refer you to the words of your own note of May 22 last, wherein, while stating the inability of Turkey to accept the letter of the proposal made by the United States, you make the following declaration:

"'As to the fear which you express that the commerce of the United States will be placed on a lower footing in consequence of the abrogation of the treaty of 1862, while other powers have treaties of longer duration, and that American commerce will thereby be subjected to a disadvantageous régime, I can assure you, in the name of my Government, that the Sublime Porte entertains no such idea. The esteem and regard which it has always manifested for the United States are a sure guarantee that it will maintain their rights as it has done in the past.'

"Many such declarations might be cited from the notes of yourself and your predecessors and of the ministers of foreign affairs of the Porte to the same effect, but in more unequivocal language even than yours.

"Besides these assurances, the United States are, in virtue of a treaty whose existing validity is beyond a doubt, entitled to the treatment of the most favored nation.

"The proposals heretofore made by this Government, and which have been declined by that of the Porte, were based on these assurances, and looked simply to the continuance of the most favored nation treatment so long as other nations should be more favored than our own, and no longer. In this respect our proposals are not at variance with the drafts submitted by your own Government to the United States minister at Constantinople. The principle sought to be confirmed in both is the same.

"This Government stands ready to negotiate a new treaty with Turkey, whereby the commerce of the United States may be subject to the same increase of taxes as the commerce of other nations with which

Turkey has concluded or may conclude treaties, such treaty to take effect with the general enforcement of the new tariff.

"I cannot but view the present notification, whereby the Government of the Porte ignores its assurance of and agreement for favored treatment, and seeks to place the commerce of the United States on the basis of a higher taxation, while other powers are, for the time being, entitled to a lower rate, as unfavorable to that good feeling which should mark the negotiations for a reformed tariff and a new treaty.

"This Government would willingly do all in its power to maintain the good understanding which should exist on such an important matter between two friendly nations; but it must be quite evident to you that this Government cannot willingly accept the rejection by the Turkish Government of the fundamental basis upon which the negotiation has hitherto proceeded.

"The representative of the United States at Constantinople has been instructed to protest against any instance which may come to his knowledge of the levying of ad valorem duties against the products of the United States to which the products of other nations may not be at the time liable, as a violation of the treaty of 1830."

Mr. Frelinghuysen, Sec. of State, to Tevfik Pasha, Oct. 24, 1884. MSS. Notes, Turkey; For. Rel., 1885.

"Your dispatch No. 26, of the 13th instant, in regard to the resumption of tariff conferences with the Porte is received.

"In view of the friendly disposition in the premises on the part of the Turkish minister of foreign affairs and the grand vizier, as described in Mr. Wallace's No. 466 of the 25th January last, and as the accession of a new and, as you say, liberal-minded minister of foreign affairs seems to afford a favorable opportunity for a renewal of the negotiations relative to a new tariff on the part of Turkey, and eventually, if possible, a commercial treaty, Mr. Heap is hereby authorized to take part in any conferences for that purpose under your general supervision.

"This Department, though not fully admitting that the Turkish Government gave due notice of the abrogation of the treaty of 1862, nevertheless is disposed to waive that point and to participate with the other treaty powers in the conferences on the tariff revision on the basis of the most favored nation privileges being granted to the United States in any new agreements, as were in fact conceded by the treaty of 1830.

"If new instructions for Mr. Heap should be necessary, as seems to be implied by his dispatch to you of the 10th instant, they should, as he suggests, correspond with those given to the delegates of the other nations, making no allusion to the treaty of 1862 as to a *revision* of tariff. By Mr. Wallace's No. 476 it appears that "the Austrian commercial treaty is now the only one with an undisputed future expiration," and that the Sublime Porte has declined to accede to the request of the Austrian ambassador that the rates applied to other nations may be extended

to his. This circumstance will not probably, however, stand in the way of tariff negotiations with other nations, or in the drawing up of identical commercial treaties, as is reported by Mr. Wallace in his No. 466 to be the desire of the Turkish Government. It is desirable that you should obtain and transmit to the Department a copy of the draft of any such treaty which may have been prepared by the council of ministers as intimated by the late minister of foreign affairs to Mr. Wallace. It is presumed that Mr. Heap has followed out his own suggestion of making a valuation of the articles of importation and a comparison of the same with those charged on them as a basis of agreement concerning the rates of duty to be charged. Mr. Heap appears to indicate in a general way within what limits the new rates will range.

"It is intended that these instructions should enable you to appoint Mr. Heap as delegate from the United States for conference with the delegates of the Ottoman Government and those of other nations with a view to a new commercial tariff."

Mr. Bayard, Sec. of State, to Mr. Cox, Oct. 28, 1885. MSS. Inst., Turkey; For. Rel., 1885. See also same to same, Mar. 4, 1886; MSS. Inst., Turkey.

As to proposed naturalization treaty with Turkey, see Mr. Bayard, Sec. of State, to Mr. Cox, Feb. 5, 1886. MSS. Inst., Turkey. Same to same, March 4, 1886; *ibid.*

The correspondence in 1820–'30 relative to the treaty with Turkey is given in House Doc. 250, 22d Cong., 1st sess.

The protocol of 1874 with Turkey, relative to the right of United States citizens to hold real estate in Turkey, is in Treaties of the U. S., 2d ed., 1886, and in Brit. and For. St. Pap., 1873–'74, vol. 65, 370.

The effect of Turkish restrictions on naturalization, in respect to real estate, is considered *infra*, §§ 171, 172.

The treaty between the United States and the Ottoman Empire, concluded June 5, 1862, if not that made in 1830, has the effect of conceding to the United States the same privilege, in respect to consular courts and the civil and criminal jurisdiction thereof, which is enjoyed by other Christian nations; and the act of Congress of June 22, 1860, established the necessary regulations for the exercise of such jurisdiction. But, as this jurisdiction is in terms only such as is allowed by the laws of Turkey and its usages in its intercourse with other nations, those laws or usages must be shown in order that the precise extent of such jurisdiction may be known.

Dainese *v.* Hale, 91 U. S., 13.

By the act of March 23, 1874, the President is authorized to accept the jurisdiction of certain mixed tribunals; see the proclamation thereon of March 27, 1876.

Under the act of Congress of 1848, now superseded, to carry into effect certain provisions in the treaties between the United States and Turkey, giving certain judicial powers to ministers and consuls, there being no designation of a particular place for the confinement of prisoners, such

place is left for regulation under section five of the act, or to the discretion of the acting functionary.

5 Op., 67, Toucey, 1849.

Citizens of the United States, by virtue of the provisions of the treaty of 1830 with Turkey, enjoy in common with all other Christians the privilege of extraterritoriality in Turkey, including Egypt, in the Turkish regencies of Tripoli and Tunis, and in the independent Arabic states of Morocco and Muscat.

7 Op., 565, Cushing, 1865.

As to Barbary States, see *supra*, § 141*a*.

The following documents may be referred to in this connection:

Bulgarian outrages. Report of Eugene Schuyler; President's message, Jan. 23, 1877, Senate Ex. Doc. 24, 44th Cong., 2d sess.

Capitulations. Report of Edw. A. Van Dyck; President's message, Apr. 6, 1881, Senate Ex. Doc. 3, spec. sess.

Capitulations. Second part of the report of Edw. A. Van Dyck; President's message, Feb. 2, 1882, Senate Ex. Doc. 87, 47th Cong., 1st sess.

For the following memoranda as to treaties with Turkey, I am indebted to the notes of Mr. J. C. B. Davis, as amended and modified by Mr. Adee, Second Assistant Secretary of State:

"Various attempts were made prior to 1830 to negotiate a treaty of amity and commerce with the Ottoman Porte. These efforts began in 1817, before which time American commerce in Turkish dominions had been 'under the protection of the English Levant Company, for whose protection a consulate duty, averaging one and one-fourth per cent. on the value of cargoes inward and outward, was paid.' On the 12th of September, 1829, full power was conferred upon Commodore Biddle, in command of the Mediterranean squadron, David Offley, consul at Smyrna, and Charles Rhind, of Philadelphia, jointly and severally to conclude a treaty. They were instructed to make a commercial treaty upon the most favored nation basis, and they were referred to previous negotiations by Offley, in which he had been instructed to 'be careful to provide that the translation shall be correct, and such as will be received on both sides as of the same import.'

"Rhind made a great mystery of leaving America. He sailed at night in a packet for Gibraltar, where he joined Biddle, and they proceeded together to Smyrna; but when Offley came on board in that port he informed them that it 'was perfectly well known in Smyrna that they were commissioners.'

"Rhind expressed his disappointment. It was then agreed that he should go alone to Constantinople and commence the negotiations, while his colleagues waited at Smyrna. He proceeded there and presented his letters of credence. After these ceremonies were over he submitted a draft of a treaty to the Reis Effendi, which appears to have been in French, in which tongue the negotiation was conducted. Some days later he was shown the Turkish text of a treaty, and was told by the Reis Effendi that it was 'drawn up in strict conformity with the one which he had submitted,' and on the 7th of May the treaty of 1830 was signed, the Turkish text being signed by the Reis Effendi, as it had been prepared by him, and the French text being signed by Rhind after examination and comparing it with the Turkish. A secret and separate article was also signed at the same time respecting the building of ships and purchase of ship-timber in the United States,

Rhind then dispatched a special messenger to summon his colleagues to Constantinople.

"When they arrived, and were made acquainted with the separate article, they disapproved of the latter; but rather than lose the treaty they signed both the treaty and the separate article in French and informed the Secretary of State of the reasons for their course. This caused a great breach between them and Rhind.

"The Senate approved of the treaty itself, but rejected the separate article. David Porter was then commissioned as chargé d'affaires, and was empowered to exchange the ratifications of the treaty, and to explain the rejection of the separate article. When he arrived in Constantinople he was met with complaints at the rejection of the separate article by the Senate. Then he reports that a discussion was had 'on the return of the translation made at Washington, instead of the one signed at Constantinople,' It appears from the archives of the Department of State that four versions were sent to America: (1) An English translation from the original Turkish, not verified; (2) a French translation from the original Turkish verified by Navoni, the American dragoman; (3) a French version in black ink with annotations in red ink, which from internal evidence appears to be substantially the original draft text submitted by Rhind to the Reis Effendi; (4) another English translation made from the French. The translation which went before the Senate and was acted on by that body was not identical with either of these. No French version appears to have been transmitted to the Senate with the Turkish text, but a new English version, which, from internal evidence as well as from the tradition of the Department, may be assumed to have been made in the Department of State, mainly from the French version No. 3. Whether this be so or not, it is not possible to say with certainty, in the absence of the authentic French text said to have been signed by Biddle and his colleagues, that such text was exactly rendered by the version which was submitted to the Senate in English, and which, after ratification, was offered in exchange at Constantinople.

"Porter met the difficulty by signing a paper in Turkish of which he returns to Washington the following as a translation: 'Some expressions in the French translation of the Turkish instrument exchanged between the plenipotentiaries of the two contracting parties, and which contains the articles of the treaty of commerce concluded between the Sublime Porte and the United States of America, not being perfectly in accordance with the Turkish original, a circumstance purely the effect of translation, and the Government of the United States being satisfied with the Turkish treaty, and having accepted it without the reserve of any word; therefore, on every occasion the above instrument shall be strictly observed, and if, hereafter any discussion should arise between the contracting parties, the said instrument shall be consulted by me and by my successors to remove doubts.'

"This was received at the Department of State on the 5th of December, 1831, and there is no evidence that the act was disapproved. An item was inserted in the appropriation bill to enable the President to carry out the provisions of the treaty. Porter's dispatches were placed at the service of the Committee of Foreign Affairs of the House, the subject of the appropriation was discussed in the House, and the appropriation was passed.

"No question arose respecting the differences between the versions until 1868, when the Turks claimed jurisdiction over two American citi-

zens, arrested and imprisoned by the Turkish authorities in Syria, for alleged offenses against the Ottoman Government. This claim of jurisdiction over American citizens was resisted by E. Joy Morris, the American minister, who referred to that part of the 4th article of the treaty of 1830 which provides that 'even when they may have committed some offense, they shall not be arrested and put in prison by the local authorities; but they shall be tried by their minister or consul, and punished according to their offense.' The minister for foreign affairs replied that the translation was incorrect; that the words 'they shall be tried by their minister or consul, and punished according to their offense,' and the words 'they are not to be arrested,' were not to be found in the Turkish text; and he cited Porter's declaration in support of his claim that the Turkish text should be accepted as the standard. Morris then, under instructions, secured, through the Russian ambassador, translations to be made from the Turkish text in Constantinople by the first dragoman of the Prussian legation, by the first and second dragomen of the Russian embassy, and by two former dragomen of the Russian embassy, and sent them to the Department of State. In no one of these were found textually combined the words objected to by the minister for foreign affairs, although all agree in guaranteeing immunity from arrest for crime by the Turkish authorities and the application of punishment through the instrumentality of the minister or consul.

"Mr. Fish then instructed Morris that the President had 'determined to submit the facts to the consideration of the Senate, and await its resolution before inaugurating any diplomatic action.' This was done, but without modification or authoritative interpretation of the text by that body.

"The discussion as to the true meaning of the Turkish text, assuming it to be the accepted standard, has since continued, and is still pending. The Turkish Government has controverted the assertion of jurisdiction by the United States minister and consuls over Americans charged with crime in Turkey in several cases, notably with regard to the seaman Kelly, who in 18— was tried by the consul at Smyrna on the charge of murdering a native Turk, and acquitted. The Turkish Government adhering to the allegation that the words defining jurisdictional rights in the premises, which appear in the English version, are 'not to be found' in the Turkish text, it has been repeatedly invited to submit for consideration an accurate equivalent of that text, in French or English, but so far without result. Meanwhile, the Department of State has accumulated a number of additional translations from the Turkish, made by high authority in such matters, without encountering one in which some form does not appear of distinct admission of the intervention of the minister or consuls to inflict, administer, or apply the punishment due to the crime proven. It is to be observed in this relation that in 1838 a treaty was concluded between the Ottoman Porte and Belgium, signed in parallel Turkish and French texts, between which no discrepancy is alleged; and that the French text of article 4 of that treaty is identical, as to extraterritorial jurisdiction over citizens, with the disputed text of our treaty with Turkey, concluded eight years earlier. The same provision also occurs in a still later treaty between Turkey and Portugal.

"In 1855, before question was made of the genuineness of the translation from the original Turkish of the treaty of 1830, Attorney-General Cushing held that citizens of the United States enjoyed the priv-

ilege of extraterritorialty in Turkey, Egypt, Tripoli, Tunis, and Morocco; and Attorney-General Black held that the consuls had judicial powers only in criminal cases."

Mr. J. B. C. Davis, Notes, &c., 2d amended ed. See, as to Turkey, Van Dyke's report on Ottoman capitulations.

(29) VENEZUELA.

§ 165a.

Mr. Springer's report of July 31, 1876, on the Venezuela mixed commission, is given in House Rep. 787, 44th Cong., 1st sess.

"The treaty of January 20, 1836, was terminated pursuant to notice of a decree of the President of Venezuela, which was communicated to the Secretary of State by the secretary of foreign affairs of Venezuela, in compliance with the treaty, in the following language: 'The undersigned, secretary of state for the department of foreign relations of the Republic of Venezuela, has the honor to inform the Hon. Secretary of State and Foreign Relations of the Government of the United States, that the period stipulated for the duration of the treaty of peace, amity, navigation, and commerce, concluded on the 20th of January, 1836, ratified by the United States and by Venezuela, respectively, on the 20th of April, and 25th of May, of the same year, and of which the ratifications were exchanged in this city on the 31st of the last-named month, has expired on the 31st of May of the year last past, and the undersigned has received orders and instructions from the President of this Republic to notify the Government of the United States, as required by the 34th article, 1st section, of the said treaty, that from and after the date of the receipt of this notice will begin the period of one year, at the end of which the treaty will cease to have effect in all that relate to commerce and navigation. His Excellency the President has published the order which causes this communication, and has expressed his will that the treaty should cease, in a decree issued on the 4th of the last month, of which the undersigned secretary has the honor of sending herewith a certified copy.'

"Mr. Clayton, the Secretary of State, responded on the 5th of January, 1850, as follows: 'The undersigned, Secretary of State of the United States, has the honor to acknowledge the receipt of the note addressed to this Department by his excellency the minister of foreign affairs of the Republic of Venezuela, under date the 5th of November last, accompanied by a copy of a decree of the President of that Republic, and expressing a wish that the existing treaty between the United States and Venezuela, in all those parts relative to commerce and navigation, should terminate within a year from the receipt of that note, conformably to the tenth paragraph of the thirty-fourth article of the treaty. The note referred to having been received at this Department on the third instant, the stipulations of the treaty to which it applies will consequently cease to be binding on either Government on and after the third of January next.'

"In 1859 a claims convention was made for the settlement of what were known as the Aves Island claims. For the correspondence respecting these claims, see Senate Ex. Doc. 25, 3d sess. 34th Cong. The last payment was made by Venezuela on the 12th of September, 1864 to 'H. S. Sanford, attorney in fact for the creditors,' who 'acknowledged to have received from the Government of Venezuela, through the

General Credit and Finance Company of London, full satisfaction of the dues under the convention made at Valencia on the 14th January, 1859, between the United States and the Republic of Venezuela, and known as the Aves convention,' and 'in behalf of the creditors under said convention relinquished all claims upon the Government of Venezuela in virtue of the same, or of the convention of 5th June, 1863, hypothecating for its benefit the export dues of certain ports of Venezuela.'

"The treaty of amity, commerce, navigation, and extradition of 1860 was terminated by notice from the minister of Venezuela as follows: 'The Congress of the United States of Venezuela passed, on the 18th of May last, a law directing the Executive to notify nations with which Venezuela had treaties whose term had expired of such expiration. This is the case with regard to the treaty of friendship, commerce, navigation, and extradition, made August 27, 1860, for a term of eight years, counting from the time of the exchange of ratifications, which has expired by reason of the said exchanges having taken place at Caracas, August 9, 1861.

"'In accordance, therefore, with the provisions of the law, I have the honor to make, by the present communication, and in the name of my Government, the notification provided for in respect to the said treaty, in order that the due effect may be reached, and that the compact may cease to be obligatory in one year after the making of this declaration as was agreed in article 31st of the same.'

"To this Mr. Fish replied, 'I have the honor to acknowledge the receipt of your communication of the 22d instant, by which, pursuant to instructions received from your Government, you give the official notification to the United States of the intention of Venezuela, as stipulated in the 31st article of the convention of 1860 between the United States and Venezuela, to arrest the operations of said convention twelve months from the date of said notification.'

"The commissioners provided for by the claims convention of 1866 were duly appointed, and after examination made awards against Venezuela to a large amount. When the day of payment came, Venezuela charged that the proceedings had been so irregular as to vitiate some of the awards. The United States suspended proceedings and asked for specific statements and proof. After a delay of over a year Venezuela replied to the demand. The reply was laid before Congress. Congress did not act at that session, but a subsequent Congress enacted, February 25, 1873, 'that the adjudication of claims by the convention with Venezuela of April 25, 1866, * * * is hereby recognized as final and conclusive, and to be held as valid and subsisting against the Republic of Venezuela.'"

Mr. J. C. B. Davis, Notes, &c.

This statute, sometimes known as the "Finality act," was subsequently repealed by an act approved June 20, 1878, as the result of a prolonged examination by Congress of allegations of corruption against the members of the Carácas mixed commission, and the matter thus reverted to the competence of the Executive. Being again brought by the President before Congress, that body, by a joint resolution approved March 3, 1883, and in response to the President's solicitation of its advisory action, requested the President "to open diplomatic correspondence with the Government of Venezeula, with a view to the revival of the general stipulations of the treaty of April 25, 1866, and the appointment thereunder of a new commission," to consider all the evidence

before the former commission, and such new evidence as might be adduced, with power to make new awards, to the payment of which the moneys already paid by Venezuela and remaining in the hands of the United States Government, should be applied.

The contemplated proposal was made by Mr. Frelinghuysen to Mr. Soteldo, the Venezuelan minister, June 11, 1884, but without satisfactory result, and the President again consulted Congress in the matter. The 48th Congress adjourned without having taken joint action on the conflicting reports of the Senate and House Foreign Committees. The Executive thereupon resumed its plenary discretion in the premises, and the negotiation with Venezuela was successfully revived, a convention being signed at Washington by Mr. Bayard and Mr. Soteldo December 5, 1885, providing for a new mixed commission to hear all claims which were proper to be brought under the convention of 1866, and to make awards thereon in substitution of those of the Caracas commission. This convention was approved by the United States Senate, with amendments which have been concurred in by the Venezuelan Senate; but up to the date of preparing this volume for the press the ratifications had not been exchanged.

As to Venezuelan award, see *infra*, § 220.

(30) WÜRTEMBERG.

§ 166.

"On the 14th January last the consul-general of Würtemberg at New York presented, in behalf of his Government, its complaint of the construction put by the Supreme Court of the United States in Frederickson *v.* The State of Louisiana (23 How., 446), on the 3d article of the treaty of April 10, 1844 (8 Stat. L., 588).

"In the case referred to, a native of Würtemberg having been duly naturalized, and having died in Louisiana, bequeathing legacies to kindred residing in Würtemberg, and subjects of its King, the legacies were subjected to a tax of 10 per cent. This was under a statute of Louisiana which imposed that tax upon successions devolving on any persons not domiciled in that State, and not being a citizen of any other State or Territory of the Union. The Supreme Court held that the decedent being a *citizen of the United States*, his estate was not within the provisions of the treaty, which was intended to convey only the case of a subject of Würtemberg bequeathing property in this country, or a citizen of the United States dying and leaving property in Würtemberg. * * *

"This Government, having no power, as you are aware, to act upon any other construction of the existing treaty than that adopted by the Supreme Court, signified to the consul-general of Würtemberg its readiness to negotiate a new convention in conformity to the interpretation which his Government puts upon that now in force, and with a proposition to that effect which he submitted."

Mr. Seward, Sec. of State, to Mr. Bancroft, Aug., 1868. MSS. Inst., Prussia.

The treaty with Würtemberg of April 10, 1844 (article 3), which provides that "the citizens or subjects of each of the contracting parties

shall have power to dispose of their personal property within the states of the other by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property and may take possession thereof, and dispose of the same at their pleasure, paying such duties as the inhabitants of the country where the property lies shall be liable to pay in like cases," has no application to the property of a naturalized citizen of the United States dying in Louisiana. His property is subject to the same rule as that of other citizens of Louisiana, and his having formerly been a citizen of Würtemberg gives him no rights under that treaty.

Frederickson *v.* State of Louisiana, 23 How., 445. See *supra*, § 138.

CHAPTER VII.

CITIZENSHIP, NATURALIZATION, AND ALIENAGE.

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I. *EXPATRIATION.*

(1) PRINCIPLE OF EXPATRIATION AFFIRMED.

§ 171.

The doctrine of perpetual allegiance was one of the settled principles of the English common law, and was maintained in the United States by high authorities during the earlier period of our Federal history. See 2 Kent Com., 49; 3 Story on the Constitution, 3; Whart. St. Tr., 654; Whart. Confl. of Laws, § 5; Lawrence's Wheaton, (ed. 1863,) 995. Its assertion by Great Britain, as a basis for the claim to impress all native Britons in foreign ships, is set forth in the following letter:

"No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part."

Lord Grenville to Mr. King, Mar. 27, 1797. 2 Am. St. Pap. (For. Rel.), 149.

Congress, by an act adopted July 27, 1868, declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty, and the pursuit of happiness," and prescribes "that any declaration, instruction, opinion, order, or decision of any officer of this Government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this Government."

Rev. Stat., § 1999; 15 Stat. L., 223, 224.

Treaties recognizing the right of expatriation were executed, with various modifications in detail, with the North German Confederacy, on February 22, 1868; with Bavaria, on May 26, 1868; with Baden, on July 19, 1868; with Würtemberg, on July 27, 1868; with Belgium, on November 16, 1868; with Hesse, on July 23, 1869; and with Austria, on September 20, 1870. With England the negotiations were more protracted, but were at last closed by the adoption by the Imperial Parliament, on May 14, 1870, of an act by which it is declared that "any

British subject who has, at any time before, or may at any time after, the passing of this act, when in any foreign state, and not under any disability, voluntarily become naturalized in such state, shall from and after the time of his having become so naturalized in such foreign state, be deemed to have ceased to be a British subject and be regarded as an alien." The same act confirms the provisions of treaties by which aliens naturalized in England may divest themselves of their acquired, and resume their native, allegiance; and it authorizes any person born in Her Majesty's dominions, who is also at the time of his birth a subject of a foreign state, when he arrives at full age to elect the latter allegiance.

The political departments of the Government have always united in acknowledging the right of expatriation.

See Lawrence's Wheaton, 925; Whart. Confl. of Laws, § 5; Senate Ex. Doc. 38, 36th Cong., 1st sess., 153; House Ex. Doc. 91, 33d Cong., 1st sess.

The legislation of Congress defining naturalization is given *infra*, § 173.

That expatriation is a natural right, see Mr. Jefferson to Mr. Manners, June 12, 1817, 7 Jeff. Works, 73; and to same general effect, see 2 John Adams's Works, 370; 7 *ibid.*, 174; 9 *ibid.*, 313, 314, 321; 10 *ibid.*, 282.

"Your proffered exertions to procure the discharge of native American citizens from on board British ships of war, of which you desire a list, has not escaped attention. It is impossible for the United States to discriminate between their native and naturalized citizens, nor ought your Government to expect it, as it makes no discrimination itself. There is in this office a list of several thousand American seamen who have been impressed into the British service, for whose release applications have from time to time been already made. Of this list a copy shall be forwarded to you to take advantage of any good offices you may be able to render."

Mr. Monroe, Sec. of State, to Mr. Foster, British minister at Washington, May 30, 1812. MSS. Notes For. Leg. 3 Am. St. Pap. (For. Rel.), 454.

The British Government, during the war of 1812, refused in a number of cases to treat persons who, though born in Great Britain, had been naturalized in the United States, as prisoners of war, transferring them to prisons and rejecting proposals for their exchange. The action of the Government of the United States in this relation is given in 3 Am. St. Pap. (For. Rel.), 630 *ff.* See also *infra*, § 331.

"Mexico herself has laws granting equal facilities to the naturalization of foreigners. On the other hand, the United States have not passed any law restraining their own citizens, native or naturalized, from leaving the country and forming political relations elsewhere. Nor do other Governments in modern times attempt any such thing. It is true that there are Governments which assert the principle of perpetual allegiance; yet, even in cases where this is not rather a matter of theory than of practice, the duties of this supposed continuing allegiance are left to be demanded of the subject himself, when within the reach of the power of his former Government, and as exigencies may

arise, and are not attempted to be enforced by the imposition of previous restraint preventing men from leaving their country."

Mr. Webster, Sec. of State, to Mr. Thompson, July 8, 1842. MSS. Inst. Mex. 6 Webster's Works, 454.

"What is important to the United States in this respect, so far as Italy is concerned, is an agreement on the principle upon which the institutions of the United States, and of all other American States mainly rest; namely, the right of a man in any country who is neither convicted nor accused of crime to change his domicile and allegiance with a view to the free exercise of his own faculties and the pursuit of happiness in his own lawful way. I am not aware that any considerable military inconvenience resulted to either country from the exercise of the right mentioned by the citizens of the United States and Italy during the war in which both were recently engaged."

Mr. Seward, Sec. of State, to Mr. Marsh, July 16, 1868. MSS. Inst., Italy.

"The principles to be settled are, that it is the right of every human being, who is neither convicted nor accused of crime to renounce his home and native allegiance and seek a new home and transfer his allegiance to any other nation that he may choose; and that having made and perfected that choice in good faith, and still adhering to it in good faith he shall be entitled from his new sovereign to the same protection under the law of nations that that sovereign lawfully extends to his native subjects or citizens."

Mr. Seward, Sec. of State, to Mr. Johnson, Sept. 23, 1868. MSS. Inst., Gr. Brit.

"Your dispatch No. 45, of the 16th ultimo, upon the subject of Miguel Felipe and Bartholome Antich, natives of Venezuela, but naturalized in this country, has been received. The course taken by you in regard to the matter is approved. The Venezuelan minister for foreign affairs, however, seems to have mistaken the meaning of the clause of the constitution of that Republic to which he refers as justifying their claim to jurisdiction over those persons. That clause merely affirms a truism contained in many other constitutions, and founded upon public law, that all persons born in a country are to be regarded as citizens thereof. It does not deny the right of expatriation, as the minister appears to suppose. Few Governments now make such a denial, and the Department is not aware of any law of Venezuela which prohibits emigration from that country and naturalization elsewhere. If, however, as appears to be the case, the persons referred to propose to return to the United States, that step, if carried into effect, would relieve us from further controversy in regard to their particular case."

Mr. Fish, Sec. of State, to Mr. Pile, June 22, 1872. MSS. Inst., Venez.; For. Rel., 1872.

"It seems to this Department that the individual right of expatriation, which was thus referred to by Chief-Justice Marshall, is recognized

by that clause of the fourteenth amendment to the Constitution which makes subjection to the jurisdiction of the United States an element of citizenship. This conclusion is strengthened by the simultaneous action of Congress."

Mr. Fish, Sec. of State, to Mr. Washburne, June 28, 1873. MSS. Inst., France.

"I invite the earnest attention of Congress to the existing laws of the United States respecting expatriation and the election of nationality by individuals. Many citizens of the United States reside permanently abroad with their families. Under the provisions of the act approved February 10, 1855, the children of such persons are to be deemed and taken to be citizens of the United States, but the rights of citizenship are not to descend to persons whose fathers never resided in the United States.

"It thus happens that persons who have never resided within the United States have been enabled to put forward a pretension to the protection of the United States against the claim to military service of the Government under whose protection they were born and have been reared. In some cases even naturalized citizens of the United States have returned to the land of their birth, with intent to remain there, and their children, the issue of a marriage contracted there after their return, and who have never been in the United States, have laid claim to our protection, when the lapse of many years had imposed upon them the duty of military service to the only Government which had ever known them personally.

"Until the year 1868 it was left embarrassed by conflicting opinions of courts and of jurists to determine how far the doctrine of perpetual allegiance derived from our former colonial relations with Great Britain was applicable to American citizens. Congress then wisely swept these doubts away by enacting that 'any declaration, instruction, opinion, order, or decision of any officer of this Government which denies, restricts, impairs, or questions the right of expatriation, is inconsistent with the fundamental principles of this Government.' But Congress did not indicate in that statute, nor has it since done so, what acts are deemed to work expatriation. For my own guidance in determining such questions, I required (under the provisions of the Constitution) the opinion in writing of the principal officer in each of the Executive Departments upon certain questions relating to this subject. The result satisfies me that further legislation has become necessary. I therefore commend the subject to the careful consideration of Congress, and I transmit herewith copies of the several opinions of the principal officers of the executive department, together with other correspondence and pertinent information on the same subject.

"The United States, who led the way in the overthrow of the feudal doctrine of perpetual allegiance, are among the last to indicate how their own citizens may elect another nationality. The papers submitted

herewith indicate what is necessary to place us on a par with other leading nations in liberality of legislation on this international question. We have already in our treaties assented to the principles which would need to be embodied in laws intended to accomplish such results. We have agreed that citizens of the United States may cease to be citizens, and may voluntarily render allegiance to other powers. We have agreed that residence in a foreign land, without intent to return, shall of itself work expatriation. We have agreed in some instances upon the length of time necessary for such continued residence to work a presumption of such intent."

President Grant, Fifth Annual Message, 1873. See *infra*, §§ 176 *ff.*

"I have again to call the attention of Congress to the unsatisfactory condition of the existing laws with reference to expatriation and the election of nationality. Formerly, amid conflicting opinions and decisions, it was difficult to exactly determine how far the doctrine of perpetual allegiance was applicable to citizens of the United States. Congress, by the act of the 27th of July, 1868, asserted the abstract right of expatriation as a fundamental principle of this Government. Notwithstanding such assertion, and the frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation, or when a citizen shall be deemed to have renounced or to have lost his citizenship. The importance of such a definition is obvious."

President Grant, Sixth Annual Message, 1874. See *infra*, §§ 176 *ff.*

"The individual right of expatriation being admitted, the correlative right of the State to determine what acts are to be taken as evidence of such expatriation necessarily follows—it is a necessary and inevitable corollary."

Mr. Fish, Sec. of State, to Mr. Davis, June 28, 1875. MSS. Inst., Germ.

"I have to observe upon the subject that the Russian Government does not admit the right of expatriation, but holds that a Russian subject who leaves Russia without the permission of the Emperor breaks the laws of his country, and the code provides punishment therefor.

"Russia has no treaty stipulations with the United States which in any way modify the case so far as our citizens are concerned. If, therefore, one of these returns to the jurisdiction of the offense which had been entirely committed before his naturalization here, the American passport which will be given him on proper application will assure the earnest attention of our diplomatic and consular officers in case there may be any proper opportunity of service to him. The Department cannot, however, guarantee freedom from detention, nor protection and release in case charges are there prosecuted, for infractions of Russian

law committed by the individual while a Russian subject and before any obligation was acknowledged by him to the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. Halpern, Nov. 27, 1883. MSS. Dom. Let. See also Mr. Frelinghuysen to Mr. Adler, Apr. 14, 1883; to Mr. Fletcher, June 30, 1884; *ibid.*

But see as qualifying this statement, Mr. Blaine to Mr. Randall, June 8, 1881, quoted *infra*, § 172.

"The Government of Italy does not recognize foreign naturalization as extinguishing the obligation of its former subjects to military service; nor has that Government any treaty stipulations with the United States which in any way modify the case so far as our own citizens are concerned. If, therefore, such native, so naturalized, returns to the jurisdiction to which he was once subject, the American passport which will be given him, on proper application, will insure the earnest attention of our diplomatic and consular officers in case there may be any proper opportunity of service to him. The Department cannot, however, guarantee freedom from detention, nor protection and release in case charges are prosecuted, based on conditions preceding the acknowledgment of obligation to the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. De Pierre, Dec. 16, 1883. MSS. Dom. Let.

"Referring to your dispatch No. 350, of the 4th of May, 1882, in relation to the case of John R. McCormack, who was at that time a prisoner in the jail of Clonmel, county Tipperary, Ireland, I now transmit to you a copy of a letter of 28th of November last, addressed by Mr. McCormack to the President, in which he invokes the action of this Government to secure for him from that of Great Britain $50,000, as indemnity for five months' imprisonment in the jails of Clonmel and Naas. You have in the records of your legation a certificate of the naturalization of John McCormack in the justices' court of Troy, Rensselaer County, New York, on the 25th of October, 1867. His explanation of the apparent discrepancy in the name under which he goes and under which he was arrested, namely, that he adopted the middle initial R, as representing the name of his mother, whose maiden name was Ryan, in order to distinguish himself from several other John McCormacks residing in the county Tipperary, three of whom were first cousins of his own, appears to be reasonable, and, assuming that it was at the time satisfactory to you, I proceed upon the hypothesis that the John McCormack naturalized in Troy in 1867 and the present claimant are identical.

"From the statements made to you by Mrs. McCormack, the wife of the claimant, it appears that her husband returned to Ireland in 1869, and that, with the exception of a brief visit to the United States in 1873, he had resided there from that time (1869) up to the time of his arrest, in the latter part of 1881 or the beginning of 1882. He still resides there, as his letter to the President is dated from the 'People Office,'

a local newspaper in Tipperary of which he is and for many years has been the publisher and proprietor and presumably the editor, although that fact is not stated. He has thus been for a period of over fourteen years absent from his adopted country, and, moreover, a voluntary resident of the country of his birth, and within the jurisdiction, territorial, political, and judicial, of the Government of his original allegiance, under whose flag he was born and grew to manhood. He has during all this period been relieved from his proper share of the duties and obligations that attach to and may be imposed on a citizen of the United States. He pays no taxes, either State or Federal, in this country, and does not allege that he has one dollar's worth of property, real or personal, within the territorial jurisdiction of the United States; he is not within the call or control of this Government if he were needed for its defense; still further, he has not only failed during all these years to express any intention of ever returning to the United States, but he has also failed, in his acts, his general conduct, and his pursuits, to give any sign or manifestation of such intention to return to the country which he claims as that of his adoption. He writes and talks as a man who considers himself domiciled for life in the country of his birth and original allegiance. These facts form very strong evidence of voluntary expatriation. (See *infra*, §§ 176, *ff.*)

"The Congress of the United States has clearly recognized in its declaratory act of the 27th of July, 1868 (Rev. Stat., § 1999), the right of voluntary expatriation as an inherent right of every American citizen. He may denationalize himself at any time he sees fit and the same law expressly forbids any executive or ministerial officer of this Government from questioning the right. It is true, as you state in your No. 350, of the 4th of May, 1882, that with some continental powers the United States have concluded conventions on the subject of citizenship and naturalization by the terms of which two years' voluntary residence of a naturalized citizen of the United States in the country of his origin is to be taken as presumptive evidence of his renunciation of United States allegiance and citizenship. We have, however, no treaty on the subject with Great Britain. * * * Thus, an American citizen may travel or reside in a foreign country indefinitely for the purposes of education, health, business, or of pleasure, and continued absence from the United States, not accompanied by any act inconsistent with his allegiance to this country, will not cause a forfeiture of citizenship. If, however, such citizen removes his family and property from the United States, enters into business, and settles permanently in a foreign country, neither expressing nor manifesting by his acts any intention of returning permanently to the United States, and if, under the latter circumstances he wishes the protection of this Government against the Government or laws of the country in which he has residence, it becomes a proper subject of inquiry whether he has not voluntarily abandoned his right to such protection. The active exertion of the Government

in the protection of a citizen may also be influenced by the acts of the individual, even if he has not technically forfeited his citizenship. This Government recognizes neither by its laws nor its practice any distinction between a native and a naturalized citizen; both are alike entitled to the protection of the Government, abroad as well as at home, and each has such protection extended to him in the same measure under proper conditions. * * *

"In 1866 Mr. Seward, then Secretary of State, received an application for passports from five brothers residing in Curaçoa, who were born in that island of parents citizens of the United States. The young men had always resided in Curaçoa, had all their property there, and had 'never been in the United States.' The passports were refused on the ground that they were not entitled to the protection of this Government. (See *infra*, § 185.)

"In 1873 the son of John Pepin, a Frenchman by birth, invoked the protection of this Government against the operation of the French military law. The circumstances of his case were these: Pepin, when a young man, emigrated to the United States, was educated in Kentucky, became a citizen of the United States, resided in New Orleans several years, returned to France, married a French woman, and remained in France until his death. Some eight years after his return to France two children were born to him, one of them the son in question, who at the time of his application was eighteen years old. Protection in this case was refused by my predecessor Mr. Fish. In 1856, Mr. Cushing, then Attorney-General of the United States, in a learned opinion maintains the right of expatriation and places the evidence in support thereof on a hypothetical basis in all respects similar to the facts in McCormack's case, that is, that when the individual removes himself, his family, and his property from the country, and takes up his residence in a foreign country, manifesting no intention to return to the United States, he is to be considered as having renounced his allegiance to this Government (8 Op., 139); and Mr. Black, the successor of Mr. Cushing, in 1857 holds the same doctrine (9 Op., 63). It would be superfluous to multiply these precedents. The action of the executive branch of the Government has been uniform on the subject. When a citizen of the United States voluntarily places himself within the jurisdiction of a foreign Government and subjects himself and his property to its laws, and when such citizen afterwards seeks the interference of the United States to redress some wrong which he may have suffered at the hands of such foreign Government, this Government reserves to itself the right of determining not only on the merits of the particular claim, but also on the claimant's right to its protection. It is for this Government to say whether the claim shall be presented or not to the foreign Government. In the case of McCormack, however, it is not necessary to decide whether he has technically lost his adopted citizenship. He is at liberty, and peacefully following his occupation in the

country of which he complains, and to which he returned two years after his naturalization in the United States. He asks a money indemnity for imprisonment suffered under the laws of the country where he lives, and asks the United States to procure it for him. To the United States, for over fourteen years, he has rendered no service, he has paid no taxes, has not been available for the defense of his adopted country in case of possible war, neither has he been accessible for jury duty, and he has no personal or material interests here."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, Feb. 27, 1884. MSS. Inst., Gr. Brit. As to allegiance of children born abroad to citizens of the United States, see *infra*, § 185. Mr. Fish's instructions in Pepin's case are given *infra*, § 176.

"I have the honor to acknowledge the receipt of your letter of the 23d instant in regard to the case of Mr. E. Chryssofondis, of Baltimore, and to say that there is no treaty of naturalization between the United States and Turkey. In default thereof, however, no case is known in which the latter Government has failed to recognize the effect of a valid naturalization of a Turk in the United States on the fact being proved. This Government makes no distinction in such a case between the treaty right of naturalized citizens of whatever origin and those of native citizens. [See section 2000, Revised Statutes of the United States.]"

Mr. Bayard, Sec. of State, to Mr. Findlay, June 29, 1885. MSS. Dom. Let.

"I have received your No. 35, of the 24th ultimo, having especial reference to the cases of the naturalized American citizens, Kevork Guligyan and Bedros Iskiyan, whose registration in the Turkish bureau of nationality is refused on the sole evidence of their passports, and embracing general considerations on the subject of the right of expatriation.

"Separating the special and general topics, we may consider, first, the present case of the two persons mentioned, and, further, the broader principle affecting our naturalized citizens of Ottoman nativity who may return to Turkey.

"It would appear from your remarks that these two persons seek registration as foreigners, in order to be qualified to hold real estate as such. 'Nor do I know,' you say, 'what is the status of these men now claiming citizenship of the United States; but when native Turks come here to live and seek to acquire real estate under the capitulation and protocols which enable all foreigners to hold such property here, then the question of citizenship is at once mooted, and not generally until then is the law of 1869 evoked as a touchstone of citizenship abroad.'

"If their purpose in seeking registration as American citizens was to avail themselves of the right which Turkey concedes to foreigners under certain conditions, to acquire and hold lands in the Ottoman Empire, and were it made a condition precedent to such acquisition and holding of real property that the party shall not have infringed the Turkish law

concerning Turks who emigrate and assume a foreign allegiance without the previous consent of their Government, then this Government could not well object to the parties being called upon to qualify themselves for the enjoyment of the privilege they seek. Every sovereign state prescribes for itself the terms and conditions upon which title to lands within its jurisdiction may be acquired and held. If Turkish law imposes a disability, as to the tenure of real property, upon a Turk who has become naturalized elsewhere without the previous consent of his Government, then the question would be one of the subjection to municipal regulations of those who have voluntarily placed themselves thereunder, in a matter over which those regulations have sovereign and exclusive control. And the Turkish Government having the right to investigate the cases of persons applying, as foreigners, for the privilege of holding lands, or for any other personal privilege over which municipal laws have control, it would seem to have the right to demand of them such evidence as would enable it to ascertain whether the applicants labor under any disqualification, and, in event of their refusal to produce such evidence, to withhold the privilege sought. (See *infra*, § 234.)

"The important distinctions are, however, to be borne in mind between a municipal privilege and a personal right, and between withholding such privilege and imposing a penalty. This may be illustrated as follows: To hold real estate, or to enjoy any other municipal right controlled by statute, the applicant may be called upon to qualify himself. The burden of proof is with him. If he do not furnish the required proof, he simply fails to obtain the privilege sought. But, on the other hand, if the statute visits the individual with a penalty, the burden of proof lies upon the power which seeks to inflict the penalty; the party cannot be called upon to criminate himself, and he must be presumed to be innocent until his crime is proved. At the present time a striking instance is found in the penalties which are attached in certain countries to the profession of a particular creed. The power to expel a Jew from Turkey is claimed, notwithstanding that, as a foreigner, he may have treaty rights of residence. Expulsion being of the nature of a penalty, the ground of its application is to be proved, like any other charge against the individual.

"In short, withholding a privilege may comport with the executive function; the imposition of a penalty is essentially a judicial function. Hence, in its dealings with Turkey, as with Russia, this Government cannot acquiesce in the executive imposition of a penalty, especially on account of race or creed. To the executive of another country all our citizens must be equal. If they, being voluntarily in a foreign land, contravene its municipal statute, it is for the law to ascertain and punish their offense. (See *infra*, § 230.)

"If, therefore, registration in the bureau of nationality were sought by the two men in question merely as a formality whereby to qualify

themselves for municipal rights, this Government could not object to the application in their case of any reasonable test or mode of trial to ascertain whether any legal disability existed to prevent the concession of the privilege sought.

"I am not sure, however, that the matter is capable of consideration within these narrow limits. It seems to trench upon the broad question of the right of expatriation, and to involve application to any and all Turks who, being naturalized in the United States, may return to Turkey.

"I have not been able on cursory search to find in the files of the Department the text of any law or regulation establishing the bureau of nationality and defining its function. I, have, however, read the law of nationality of January 19, 1869, and find in it the following suggestive article:

"'ART. 9. Every individual inhabiting Ottoman territory is reputed an Ottoman subject, and will be treated as such until his character as a foreigner is verified in a regular manner.'

"From this I infer that the bureau of nationality is established to 'verify in a regular manner' the alienship of all foreign inhabitants of Turkey, and record the fact.

"As in the case of Guligyan and Iskiyan, the bureau has declined to admit them to registry, except on certain proof being submitted, it may be inferred that the evidence called for is deemed essential to the regular verification of the foreign status of the parties, and this especially with reference to article 5 of the law of 1869, which reads thus:

"'ART. 5. An Ottoman subject, acquiring a foreign nationality with the sanction of the Imperial Government, will be considered and treated as a foreign subject. If, on the contrary, he has obtained foreign naturalization without the previous authorization of the Imperial Government, such naturalization will be considered as null and void, and he will be regarded and treated in every respect as an Ottoman subject. No Ottoman subject can in any case naturalize himself as a foreigner without obtaining a deed of authority in virtue of an imperial iradé.'

"It would be desirable, toward a full understanding of the subject, to know the powers and functions of the bureau of nationality, with reference to the fifth and ninth articles of the law of 1869, which I have quoted. Is the bureau merely designed to afford to aliens an opportunity to record their status? Or is registration therein made obligatory upon all aliens, and does the absence of an alien's name from its books create, *ipso facto*, for the purposes of Turkish jurisdiction, the presumption that he is an Ottoman subject, and entail upon him the treatment as such contemplated in the ninth article of the law?

"And, further, is the bureau made competent to exercise the quasi-judicial functions of deciding, under article 5 of the law, the status of a Turk who may have acquired a foreign nationality?

"You are expected to enlighten the Department on these points, sending hither, if possible, the text of any law, decree, or regulation under which the bureau of nationality may have been organized, or of any rules or regulations defining its functions and powers.

"Pending your report as to these points, I may probably give some attention to the general principle involved where there is international conflict of laws concerning the right of expatriation. The United States hold steadfastly to that right. The doctrine was well enunciated in 1868 in the words of Mr. Seward, quoted by you in your note of October 22 to Said Pasha, and in even more precise terms was incorporated in an act of Congress approved 27th July, 1868, now section 1999 of the Revised Statutes. Under the law of 1869 the Porte is understood to claim that it can discriminate between naturalized and other citizens of the United States, and treat as Turkish subjects those Turks who have been naturalized in the United States since 1869 without the prior consent of the Ottoman Government.

"This Government has never admitted, and cannot now admit, the doctrine for which the Porte contends. Within our domestic jurisdiction we are bound to uphold and enforce the right of expatriation, and our assertion of that right follows to every foreign country the alien who has become a citizen of the United States by due process of law, and regards him as the equal of a native-born American citizen. We may not abandon the assertion of that right in favor of the counter assertion of the Government of such a person's original allegiance.

"The laws of the United States thus inhibiting absolutely any discrimination between their native-born and naturalized citizens, the same form of passport is prescribed for all alike, and, under international law, is to be accepted everywhere as *prima facie* evidence of nationality. Our duty is limited to the positive one of lawfully certifying the fact of American citizenship, and this Government cannot be expected to go beyond the bounds of its power and duty by assenting to such a contention on the part of a foreign Government as would, if logically carried out, involve the negative obligation to show that the citizen had not at some previous time been subject to another power.

"I am aware of no Government whose contention in this regard appears to go as far as that of Turkey. Other sovereign states, it is true, deny the right of expatriation without prior consent, but none, to my knowledge, imposes upon every alien resorting to its territory the burden of disproof.

"The contention of Turkey may in fact be found to go even further, and assert a power on the part of the Porte to forbid the Government of the state whose citizenship a Turk may have lawfully acquired from diplomatic intervention in his behalf, if the Turkish law declares him to be still a subject of the Porte. I do not know that this is so; I trust it is not. There may be an analogy, however, between the Turkish rule of registration and the Mexican law of matriculation. In Mexico, all

foreigners are required to deposit their passports in the ministry of State at the capital and take out a certificate of matriculation, which is alone admitted as evidence of their rights as foreigners in that country. Failing such registry, they can assert no civil or judicial rights of alienage; and the law even proclaims that no diplomatic intervention of their Government will be admitted in their behalf under whatever circumstances. The United States have for years contested this position, asserting that no municipal statute of another country can overthrow the reciprocal relations of a foreigner with his own Government, or impair the obligation of the latter to intervene for his protection in case of wrong or denial of justice. (See *infra*, § 172 *a*.)

"But, extreme as is the Mexican position, it merely rests on the execution of a formality. It accepts the passport as the evidence of alienage, and simply substitutes, for municipal effects, one form of indiscriminating certification for another.

"The Turkish rule, on the contrary, rests on a vital discrimination between classes of foreigners; it imposes a burden of proof unknown elsewhere, and it assumes not merely to treat certain persons as Turks until the contrary is shown, but to make them Turks.

"The question is, in its broadest aspect, one of conflict between the laws of sovereign equals. The authority of each is paramount within its own jurisdiction. We recognize expatriation as an individual right. Turkey, almost solely among nations, holds to the generally abandoned doctrine of perpetual allegiance. Turkey can no more expect us to renounce our fundamental doctrine in respect of our citizens within her territory than she could expect to enforce her doctrines within the United States by preventing the naturalization here of a Turk who emigrates without the authorization of an imperial iradé.

"In such cases, where the disagreement is fundamental, a conventional arrangement is practically the only solution to the difficulty, Founding on the volition of the individual as an ultimate test, the United States, without impairing their doctrine of the inherent right of expatriation, but rather confirming it, may agree upon certain conditions, according to which a person who has been naturalized in the United States and returns voluntarily to the country of his original allegiance, there to remain for a stated period, may be held to have created a presumptive intent to resume his former status, and thereby abandon his acquired nationality. We recognize the individual right to do so; repatriation is as equally a right as expatriation.

"The United States have negotiated treaties of naturalization with several Governments, including Turkey. The latter, signed August 11, 1874, was ratified by the Senate with amendments, and subsequently exchanged on the 22d April, 1875, at Constantinople. It subsequently appeared, however, that it had been ratified and exchanged by Turkey under a misapprehension of its true meaning. As you will see by perusal of Mr. Maynard's No. 11, of July 6, 1875, the Turkish Govern-

ment supposed us to stipulate that two years' residence in the country of original allegiance should operate to forfeit the nationality subsequently acquired by naturalization. Mr. Fish held that the true meaning was that such residence created a presumption of intent to remain, which might be rebutted, like any other presumption, by competent proof.

"Our position in this regard has always been consistent, although in other quarters the misapprehension into which the Ottoman Government fell in 1875 has been found to exist. The reason of our position is clear. The treaties we have made simply recognize and define an existing status under the laws of the two parties; they do not assume the legislative or judicial power of making and unmaking citizens. They leave the laws of the land of return free to operate, after two years, to restore the former allegiance. The treaty does not restore the original status any more than it can forfeit the acquired one, and perhaps leave the party without any national status whatever. Moreover, forfeiture of status is essentially a penalty, and the Porte's understanding of the treaty signed in 1874 would have involved the assumption by the United States Executive of the power and obligation to apply such a penalty to an American citizen who, under certain circumstances, might reside in Turkey for more than two years. There is no statutory warrant for the exercise of such a power, and for the Executive to assume it would be repugnant to the principles of our Government, according to which no man can be punished without due process of law. Hence, no form of international accord was possible with Turkey which would have imposed on the United States the obligation to declare the forfeiture of rights which an alien might have duly acquired under the naturalization statutes through the decree of a competent court.

"I refer to the past treaty negotiation to correct what seems to be a misapprehension on your part, for you say that 'the treaty failed of confirmation in the Senate because of one inconsequential word.' The difference between imposing forfeiture of citizenship and recognizing its renunciation is not inconsequential—it is vital. And, as a fact, the failure of that treaty was due to the Porte's withdrawal of the ratification it professed to have made and exchanged under a misapprehension of the purport of the Senate's amendment.

"Of all our naturalization treaties with foreign Governments, the most clearly phrased are with Great Britain, Austria-Hungary, and Denmark, copies of which are herewith sent you. Article III of the British treaty covers the point under consideration by providing for and recognizing the lawful recovery of original allegiance and renunciation of that acquired elsewhere by naturalization. So, also, with Article IV of the Austro-Hungarian treaty. The latter is, furthermore, noticeable as providing for and defining the jurisdictional rights of the country of original allegiance, when the native thereof, returning thither after

naturalization abroad, is amenable under its laws for an offense committed before his emigration.

"Mr. Boker's treaty was negotiated five years after the Ottoman Government adopted the law of nationality. If that law was no obstacle then to a naturalization treaty with the United States, it should not be now. It should be your earnest effort to induce the Porte to negotiate again on the subject, with a view to a just and mutually honorable accommodation. You should make clear to the minister for foreign affairs that the Executive is strictly inhibited from acquiescing in the jurisdictional claims of Turkey, for it can neither recognize nor impose forfeiture of rights acquired by lawful naturalization; but that we stand ready, by treaty, to respect any process whereby, under Turkish law, duly applied, the voluntary act of a naturalized Turk who returns to reside in Turkey may operate as a renunciation of his acquired status and resumption of original allegiance. The limits within which such a negotiation may be conducted are found in the Americo-Turkish treaty of 1874, as amended by the Senate, and in our treaties with Great Britain and Austria-Hungary.

"I await, as before stated, your report on the function and powers of the bureau of nationality. Meanwhile, this instruction will make clearer to you the attitude of this Government on the general question of the treaty rights of our citizens in Turkey, whether native or naturalized."

Mr. Bayard, Sec. of State, to Mr. Cox, Nov. 28, 1885. MSS. Inst., Turkey; For. Rel., 1885. See further instructions by Mr. Bayard as to the Turkish "bureau of nationality," *infra*, § 172.

The protocol of 1874 with Turkey as to the right of citizens of the United States to hold real estate in Turkey is in Brit. & For. St. Pap., 1873–4, vol. 65.

Although the right of expatriation was at one time denied in this country (Williams's case, Whart. St. Tr., 652), it is now regarded as established in international law.

Santissima Trinidad, 7 Wheat., 283; Portier *v.* Le Roy, 1 Yeates (Penn.), 371; Jansen *v.* The Vrow Christina Magdalena, Bee. Adm., 11, 23; *sub nom.* Talbot *v.* Jansen, 3 Dall., 383.

"There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between

them is sometimes made to depend upon the form of Government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a Republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more."

Waite, C. J. Minor *v.* Happersett, 21 Wall., 165, 166.

The doctrine of perpetual allegiance was not applied by the British courts to persons born in the United States before, and remaining here after, the acknowledgment of their independence.

Doe *v.* Acklam, 2 B. & C., 779.

The United States recognize the right of voluntary expatriation, subject to such limitations as Congress may impose.

8 Op., 139, Cushing, 1856.

A citizen of the United States, native or naturalized, may change his allegiance, provided it be done in time of peace, and for a purpose not directly injurious to the interests of the country.

9 Op., 62, Black, 1857.

Expatriation includes not only emigration, but naturalization.

9 Op., 356, Black, 1859.

The natural right of every free person who owes no debts and is not guilty of any crime to leave the country of his birth, in good faith and for an honest purpose, the privilege of throwing off his natural allegiance and substituting another in its place, the general right, in a word, of expatriation, is incontestible.

Ibid.

Questions as to citizenship are determined by municipal law in subordination to the law of nations.

12 Op., 319, Stanbery, 1867.

Under the treaty of September 20, 1870, the citizens of the United States and of Austria have, reciprocally, the right of expatriation by an uninterrupted residence of five years and naturalization. When a citizen of one of these countries voluntarily assumes in the manner prescribed the character of a citizen of the other, he cannot cast it off at pleasure so long as he remains within the jurisdiction of the latter country.

14 Op., 154, Williams, 1872.

If a citizen of the United States emigrates to a foreign country, and there, in the mode provided by its laws, renounces his American citizenship with a bona fide intent of becoming a citizen of such country,

his course should be regarded by our Government as an act of expatriation.

14 Op., 295, Williams, 1873.

The declaration in the act of July 27, 1868, chap. 249, that the right of expatriation is "a natural and inherent right of all people," applies to citizens of the United States as well as to those of other countries.

14 Op., 295, Williams, 1873.

For modern English doctrine recognizing expatriation, see 4 Phill. Int. Law (2d ed.), 195.

The terms of naturalization in modern states are given in detail in Calvo droit int. (3d ed.), vol. 2, lib. xi.

(2) CONDITIONS IMPOSED BY GOVERNMENT OF ORIGIN HAVE NO EXTRATERRITORIAL FORCE.

§ 172.

"Your dispatch No. 218, of the 18th ultimo, has been received. It relates to the detention by the Swiss local authorities of property in Switzerland claimed by natives of that country naturalized in the United States. The reasons assigned for that detention are believed to be so insufficient practically, morally, and legally that it is hoped the Federal Government of that country will lose no time in applying its authority or influence towards redressing the grievance.

"It is noticed with regret that the Swiss local authorities, at least, are disposed to maintain the doctrine of perpetual allegiance by denying the right of a native of that country to become naturalized elsewhere without their consent.

"This pretension has always been regarded here as extravagant, and as such has been resisted, so that several of the most important European countries with monarchical governments, which were most strenuous in supporting it, have receded from their claims, and have concluded naturalization treaties with the United States. Switzerland as yet has no such treaty, but the convention of 1850 between the United States and that country contains stipulations which seem applicable to the present case and adequate for disposing of it contrary to the views held in that quarter.

"It appears from your dispatch that one of the claims of the communal authorities is that they can recognize no native of Switzerland as a citizen of the United States who shall not have obtained their consent to his naturalization. This pretension is in direct conflict with the fourth article of the treaty, which says that in order to establish their character as citizens of the United States of America, persons belonging to that country shall be bearers of passports certifying their nationality. If, therefore, the nationality of any Swiss naturalized here, who may visit his native country with such passport, shall there be questioned, that act must be looked upon as a flagrant violation of the treaty, which could not be acquiesced in. (See *supra*, § 163.)

"Again, the fifth article stipulates in substance that the heirs of a Swiss decedent, being citizens of the United States, whether native or naturalized, shall inherit and dispose of the property of such decedent at their pleasure.

"An authenticated copy of the judgment of the court which may have naturalized a Swiss citizen must be regarded as conclusive proof of that act in regard to all such naturalized Swiss who may not visit their native country.

"As explicit abjuration of allegiance to his native country is by law required of every foreigner naturalized here, the fact of such abjuration is mentioned in the record. It is presumed, therefore, that when a duly attested copy of such record is presented to the authorities in Switzerland, the sufficiency of the proof which it contains will be acknowledged without hesitation.

"You intimate that the supreme court of the Confederation might decide the question conformably to the views entertained here, and suggest that a test case be prosecuted for the purpose of obtaining their opinion. This course it would be difficult and inconvenient for this Government to adopt, but it might be the most eligible for a claimant to sufficient property in that country to incur the hazard and expense which would attend it."

Mr. Evarts, Sec. of State, to Mr. Fish, Nov. 12, 1879. MSS. Inst., Switz.; For. Rel., 1879.

"It must not be forgotten that, in the absence of a specific treaty of naturalization, the personal status of a native-born American citizen, and of a Russian who has been naturalized in the United States, may be very different in Russia. The former has clearly never incurred any obligation under the laws of that country, and incurs none by going thither other than that of peaceable observance of the laws of the land. The latter, on the contrary, while yet a Russian, may, under Russian laws, have contracted personal obligations towards his native land, which under those laws may not be extinguished by the fact of leaving the country and acquiring status elsewhere as a citizen or subject of another country. In such case, if an individual so circumstanced with respect to Russian law were to return to that country and voluntarily put himself within its jurisdiction, it is probable that he would be held to the fulfillment of that personal obligation in like manner as he would be held to discharge any other personal indebtedness cognizable under Russian law. This is the case in other countries, especially in Italy, where cases of this character have arisen affecting Italians naturalized abroad, who have been held to the completion of their personal obligation of military service, without redress being practicable."

Mr. Evarts, Sec. of State, to Mr. Cronstine, Mar. 17, 1880. MSS. Dom. Let.

"I do not understand that a Russian, naturalized abroad and returning to Russia, is *ipso facto* claimed as a Russian. He may, in determinate cases, be held liable to military duty, or to punishment for unfulfillment of service due when he emigrated. With regard to such cases the Department abstains from any opinion in advance of an actual instance presenting itself for consideration. If a case arises every possible step is taken to defend bona fide American citizenship.

"Generally, however, a law-abiding naturalized Russian, returning to Russia and there obeying the laws and justifying his American citizenship in good faith, goes unmolested during any reasonable period of sojourn unless actually liable to military duty or penalty."

Mr. Blaine, Sec. of State, to Mr. Randall, June 8, 1881. MSS. Dom. Let. See, however, as to Russia, instructions of Mr. Frelinghuysen, quoted *supra*, § 171.

"While this Government does not for a moment question the right of that of Switzerland to attach such conditions as it may deem proper to the emigration of its citizens, and while it also admits that an American citizen who, while in Switzerland, commits an offense against the criminal laws of that country, may properly be held to answer for such offense before the courts of Switzerland, it cannot give its assent to a doctrine so fraught with danger to the rights of American citizens as that which holds that a citizen of the United States of Swiss nativity may be tried before the criminal courts of Switzerland for acts done or committed within the territories of the United States. That the matter for which Mr. Meyer was held criminally liable in Zurich, is not only not criminal in this country, but is authorized by its laws, simply aggravates this particular case.

"Had his act constituted an offense against the criminal code of the United States or against the laws of the State of New York, this Government would still hold that he was amenable for such offense in the courts of the United States, or of the State of New York, as the case might be, and in these courts only.

"The naturalization of an alien in the United States is the voluntary act of the party himself. Under the laws of the United States, the consent of Government of the country of his origin is not made a condition of his admission to citizenship, and when he has once attained the character of a citizen of the United States, it is held by the Government and laws of the United States to adhere to him with its proper rights and privileges, not only in the United States, but in any foreign country in which he may be, not excepting the country of his nativity or origin."

Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, Dec. 19, 1882. MSS. Inst., Switz. See further, same to same, July 28, 1883; *ibid.*

"This Department has received a dispatch of the 20th ult., from the United States consul at Beirut, stating that the Turkish bureau of

nationality at Constantinople had recently declined to certify to the American citizenship of Messrs. K. and B., on the ground that their passports did not show that they left the Ottoman Empire prior to the promulgation of the law of 1869, forbidding Turkish subjects to leave the country without permission to become naturalized in another country. The refusal referred to, for the reason alleged, seems so extraordinary at least, that you will protest against it and endeavor to have it corrected so far as it may have been or may be applied to the persons above referred to.

"Passports are issued by this Department to naturalized citizens upon the production of the certificate of naturalization. There is no law of the United States requiring a passport to state when a naturalized citizen left the country of his birth, or to embody that statement in the passport. It has not been the practice of this Department to insert such a statement in the passports issued to former Turkish subjects or to any other naturalized citizens. A different course might imply that the right of the foreign Government to participate in or to make the naturalization of its subjects conditional was acknowledged here. This it has never been and probably will never be.

"The Turkish law referred to also seems to be defective or ambiguous, inasmuch as it assumes that every Ottoman subject who leaves his native country has an intention to become naturalized elsewhere. If this be the meaning of the law, it must be contrary to facts of daily occurrence in that Empire. It may be that Turks, in proportion to their number, do not travel as much as inhabitants of other countries. Still, it is believed that comparatively few of those who do go abroad leave home for the purpose of changing their nationality."

Mr. Bayard, Sec. of State, to Mr. Emmot, May 29, 1885. MSS. Inst., Turkey; For. Rel., 1885.

On the assumption that by the Turkish law of 1869 the naturalization of a Turkish subject abroad is not valid in Turkey unless preceded by a permit from the Turkish Government, the position has been taken in Turkey that such naturalized Turk is debarred from inheriting from Turkish subjects.

Mr. Bayard, Sec. of State, to Mr. Arakelyan, Aug. 17, 1885. MSS. Dom. Let.

The defect, however, may be cured upon a petition presented through the minister of Turkey at Washington.

Mr. Bayard, Sec. of State, to Mr. Findlay, Aug. 17, 1885. MSS. Dom. Let. See *supra*, § 171.

"The United States hold steadfastly to that right [expatriation]. The doctrine was well enunciated in 1868 in the words of Mr. Seward, quoted by you in your note of October 22 to Said Pasha, and, in even more precise terms, was incorporated in an act of Congress approved 27th July, 1868, now section 1999 of the Revised Statutes.

"Under the law of 1869 the Porte is understood to claim that it can discriminate between naturalized and other citizens of the United States, and treat as Turkish subjects those Turks who have been naturalized in the United States since 1869 without the prior consent of the Ottoman Government.

"This Government has never admitted, and cannot now admit, the doctrine for which the Porte contends. Within our domestic jurisdiction we are bound to uphold and enforce the right of expatriation, and our assertion of that right follows to every foreign country the alien who has become a citizen of the United States by due process of law, and regards him as the equal of a native-born American citizen."

Mr. Bayard, Sec. of State, to Mr. Cox, Nov. 28, 1885. MSS. Inst., Turkey; quoted more fully, *supra*, § 171.

(3) NOR CAN THE RIGHTS OF FOREIGNERS BE LIMITED BY COUNTRY OF TEMPORARY RESIDENCE REQUIRING MATRICULATION OR REGISTRY.

§ 172*a*.

"This Department has no doubt that the object and the effect of the ninth article of the treaty of 1831 was to exempt the citizens of one party from compulsory service in the military or naval service of the other. Supposing the fact of citizenship in any particular case to be acknowledged, the exemption must be insisted upon, including also any tax which may be imposed in lieu of that service. The question then occurs what proof of citizenship is either Government warranted in requiring. The treaty being silent on this point, it is left for regulation by the municipal laws of the parties, which must be acquiesced in unless their purpose and effect should be to thwart a plain stipulation of the treaty. The Mexican law requiring the matriculation or registration of foreigners can scarcely be said to be of this character. Citizenship is a fact which, like others, may be proved by oral or documentary testimony. If the latter should be offered, the highest of this character would be a passport from the Mexican foreign office or from this Department. A passport is virtually a mere certificate of citizenship. It implies that the Department from which it may emanate has itself considered the evidence of the fact which it proposes to establish, and has decided accordingly. A passport may also issue from the legation, and may be presumed to be granted upon similar considerations.

"Upon the whole the Department is inclined to the opinion that the requirement of matriculation, as it is called by the Mexican Government, is not illegal, nor, under the circumstances, unduly oppressive in form, and cannot properly be protested against generally or in any particular case, unless unusual or unattainable proof of citizenship should be required."

Mr. Fish, Sec. of State, to Mr. Foster, Oct. 31, 1873. MSS. Inst., Mex.

"You will please say to the minister for foreign affairs that if the intervention of the United States in favor of Americans imprisoned is refused only because they are not matriculated, that the President expects such citizens to be now allowed to matriculate. And you are authorized to advance the requisite funds. Please send the names of prisoners and why imprisoned."

Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, Apr. 12, 1882; *ibid.*

"I have received and considered your dispatch No. 447, of the 17th ultimo, transmitting copies of the correspondence which, in pursuance of the Department's instruction No. 189, of 10th November last, you opened with the Mexican foreign secretary in regard to the murder of Mr. and Mrs. Thomas Gartrell, near the city of Durango.

"I cannot but express the regret I feel on observing Mr. Mariscal's statement that, if your representation of the facts is the omen of reclamation, the Mexican Government considers itself compelled at once to declare through him that it is not possible to accept your intervention, * * * because it does not appear on the register of matriculation under Mr. Mariscal's charge that Mr. Gartrell and his wife are citizens of the United States.

"This question of the prior necessity of matriculation, as an alien resident of Mexico under Mexican law before a foreigner can be entitled, in Mexico, to the assertion of the rights which international law ascribes to all foreigners, is one of the few questions between the two countries which remain pending in an unsatisfactory condition.

"The records of your legation show that the subject has been the occasion of discussion between the two Governments for many years. As you have doubtless familiarized yourself with the correspondence, I need refer to it no farther than to say that the divergence as to the manner in which the fact of matriculation was to be accomplished has been settled on the acceptance by the Mexican Government of the presentation of the visaed passport as evidence of foreign citizenship, and that the points remaining open concern only the rights which accrue to foreigners in virtue of such passport, or which may be denied to them in the absence of such further formality as is now insisted upon.

"This Government is not disposed to question the convenience of formal matriculation as evidencing the right of foreigners resident in Mexico to certain civil and domiciliary rights prescribed under the Mexican law. But it does question the claim of Mexico to debar from the protection of their own Government citizens of the United States who may be temporarily in Mexico and who have not matriculated.

"We hold, under the general principles of international law, that the right of an American citizen to claim the protection of his own Government while in a foreign land, and the duty of this Government to exercise such protection, are reciprocal, and are inherent in the allegiance of the citizen under the constitution of his own land, and that, inasmuch

as this reciprocal right on the part of the citizen and duty on the part of his Government is not created by the laws of any foreign country, it cannot on the other hand be denied by the municipal law of a foreign state. Holding thus, it is impossible for this Government to accept the proposition that its right to intervene for the protection of one of its citizens in Mexico can only begin with, and be created by the matriculation of such a citizen as a foreign sojourner in Mexico, and can only exist and be exercised with respect to the redress of wrongs which such a citizen may suffer there after his name shall have been inscribed on the books of the foreign office in the city of Mexico.

"This last statement of the question is not a hypothetical one; it has become expressly enunciated by the Mexican foreign secretary in the case of your application for the matriculation of American citizens in whose behalf you had intervened.

"Your own legal knowledge will show you that serious grounds exist in practice for questioning the Mexican contention on this point, even were its justice admitted, which it is not. For an American, say, for instance, a shipmaster in port, charged with some technical offense against the revenue, or arrested through the arbitrary action of an ignorant official, might, although he had no intention of sojourning in Mexico, and when it would not be claimed that there was any necessity for matriculation, be thus brought within Mexican jurisdiction under circumstances calling for the diplomatic intervention of his national protector. Or again, an American citizen when crossing the frontier on a merely temporary errand might be held to military service in the Mexican army and subjected to detention and personal loss and damage, for which, under the decision of Mr. Mariscal he could not claim relief unless armed with a certificate of matriculation obtained before the act complained of. And again, the property rights of an American might possibly be assailed in Mexico while he himself was not within Mexican jurisdiction. I have presented hypothetical cases. Others will occur to you wherein the rigid application of the doctrine enunciated by Mr. Mariscal would operate to bar all intervention for protection or redress.

"I repeat, the status of a foreigner is, under international law, inherent, and neither created nor destroyed by Mexican law. The evidence of the foreign status of an individual consists in the facts as they exist, or by the authentic certification of his own Government as in the form of a passport; it does not originate in compliance with a Mexican municipal statute.

"I desire that when you have familiarized yourself with the subject in its legal and international aspects, and in view of the precedents furnished by your legation files, you will present the question earnestly to the attention of Mr. Mariscal. In doing so, while your representations will, of course, be temperate and courteous, you should make it apparent that the United States cannot recognize the fact of matriculation

as controlling the right of a citizen of the United States to ask the intervention of this Government in case of need.

"As the treaties between the two countries which express the reciprocal rights and privileges of their citizens in the territories of the other have been terminated recently by the act of Mexico, your arguments must necessarily rest on the principles of international law. In fact, the absence of specific treaty stipulations is quite immaterial; treaties do not create the personal rights of men, they may recognize their existence and define their exercise within certain practical and convenient bounds.

"You should, further, be careful to dissociate this important subject from the specific case of the Gartrells, or any particular reclamation now pending. Such cases rest on their merits. This matriculation question rests on a higher plane, it concerns our right to protect our citizens by presenting the facts in their cases and asking consideration thereof according to the recognized principles of justice and equity."

Same to same, July 24, 1882.; *ibid.;* For. Rel., 1882.

"Your dispatch No. 820, of the 2d instant, has been received. It presents the case of Howard C. Walker, an American citizen, arrested and imprisoned at Minatitlan, the 19th of March last, charged with having stolen some lumber.

"Mr. Walker's statement to you is that for the past two years he has been shipping or river clerk for Mr. R. H. Leetch, of Minatitlan, the heaviest mahogany merchant in Mexico, and that in pursuance of his, Walker's, legitimate business, he shipped on board the bark Circassian, together with other timber, some hundred and odd logs of mahogany, which, as afterward learned, were claimed by one José R. Teran, but all bearing the brands of Mr. Leetch, and undoubtedly his property. 'The ship,' continued Mr. Walker, 'has been discharged by order of the tribunal, and not one log was found with the mark claimed by said Teran, yet, from pure maliciousness, I (Walker) am still held a prisoner.'

"You accordingly presented Mr. Walker's case to the Mexican Government, asking for a speedy investigation thereof. Mr. Fernandez advises you, in reply, that, as a matter of courtesy, he will obtain information upon the subject, but admonishes you that, Mr. Walker not having been registered at the foreign office, diplomatic intervention in his (Walker's) behalf will not in future be admitted.

"Like yourself, I confess to not a little surprise that the Mexican Government should have again resorted to so untenable a ground as that herein advanced, especially, too, in view of the fact, which you state, that since your note to Mr. Mariscal of September 25, 1882, based upon my instruction of July 24, 1882, No. 298, wherein the question of matriculation was fully discussed, you have had occasion to repeatedly call the attention of the Mexican Government to cases of American citizens

imprisoned in Mexico, with a view of securing an investigation and speedy trial, and in not one of which has objection been made to your interposition on the ground that the accused person had not matriculated.

"In that instruction you were told that this Government declined to recognize the pretension of Mexico to limit the diplomatic intervention in behalf of abused citizens of the United States in Mexico, to those cases in which the injured person had been registered or matriculated, and that the inherent right of such citizen to demand of his Government and its duty to afford him such protection as was possible in a foreign land could not be controlled or abridged by a Mexican municipal statute.

"Your action and conclusion in respect of Mr. Walker's case is therefore approved. Until Mexico shall meet our argument as to matriculation on such basis as this Government may accept, with due regard to its constitutional and international right to protect its citizens abroad, you will continue to ignore the Mexican contention that a failure to matriculate necessarily debars a citizen of the United States from the assistance of its diplomatic representative at the Mexican capital."

Same to same, June 23, 1884; *ibid.*

"It may be presumed that, in providing for a system of matriculation, the aim of the Mexican Government is to defend itself against unjust foreign claims, an object to which, as a general principle, no exception can be taken. When the Mexican Government, however, by domestic act, undertakes to sever the relations of dependence and protection which exist between the citizens of a foreign state and their own Government, it is clear that it goes beyond legitimate bounds, and that acquiescence in such measures is not to be expected from the Government whose constitutional and international rights are so infringed."

Same to same, Nov. 4, 1884; *ibid.*

"I am in receipt of your telegram of the 17th instant to the effect that your official diplomatic intervention in behalf of Monahan, had, on the ground that he is not matriculated, been refused by the Mexican Government.

"This telegram is assumed to be in response to the Department's instruction, instructing you to present evidence of Monahan's citizenship. The object was to place on record in that case, as in any other of the same character which may arise, our official non-acceptance of the Mexican doctrine of matriculation.

"There is perhaps in the relations of the two countries no one subject upon which an accord is more necessary than this of the right of the citizens of the one country in the territory of the other to the protection of their own Government. The Mexican law of matriculation seeks to impair this inalienable duty of protection by making its exercise depend upon a domestic law of one of the parties. We hold, in broad

terms, that it is not within the scope of municipal legislation to impair the relations of an alien towards his own Government, or to impair the international right of his Government, as one among equals in the community of states, to intervene with another Government to secure him justice."

Same to same, Dec. 20, 1884; *ibid.*

To this, Mr. Morgan, on January 12, 1885, answered by submitting the following statement:

"(1) 'The provisions of the Mexican matriculation law.'

"The law referred to consists of two decrees issued by President Juarez, the first from the city of Mexico, on the 16th of March, 1861, the second from the city of Chihuahua, on the 6th of December, 1866. The text and a translation of both decrees are annexed hereto.

"The second decree reforms the first in several particulars, especially by permitting foreigners, although they have not been registered as such, to appear before the tribunals of the country, notaries, &c. But the provisions of the first decree, in so far as they provide that foreigners who may wish to exercise rights as such shall cause themselves to be enrolled on the register of matriculation and to take out certificates thereof, were declared to remain in force. And to the first decree was added a most important clause, viz, that matriculation produces no retroactive effect. That is, if the fact which gave rise to a demand in behalf of a foreigner existed before he became matriculated, the foreign nationality of the claimant cannot be admitted. * * *

"(2) 'Whether applicable to transient sojourners, travelers, officers, and crews of vessels, and the like, who have no purpose or opportunity of sojourn.'

"I know no case where the decrees have been invoked against captains of vessels. It was not referred to in the correspondence between this legation and the department for foreign affairs in the case of Captain Metzer of the steamer Newbern, or in the case of Capt. George Caleb of the schooner Adriana, with both of which cases you are familiar. The decrees, however, are general in their scope, and make no exceptions in favor of any class of persons. They evidently, in the opinion of the Mexican Government, apply to travelers (and therefore to sojourners). They were invoked by anticipation, as you will remember, in the case of Mr. and Mrs. Thomas R. Gartrell. * * *

"(3) 'What rights as a foreigner are established by the fact of matriculation?'

"None that I am aware of beyond those mentioned in the decrees to which I have referred, and the rights of their respective Governments after their matriculation to have any intercession presented through diplomatic channels.

"(4) 'What rights are denied in the event of non-matriculation?'

"The right to the official diplomatic intervention of their Government in their behalf in case of need. For instance, if a citizen of the United States should be arrested for any cause in Mexico, no diplomatic intervention in his behalf would, under the decrees, be admitted, if he had not previously matriculated at the foreign office. A late example is the case of Thomas R. Monahan. At first the objection that he was not matriculated was not raised; but at last, when I demanded his immediate trial or release, I was informed that my official diplomatic intervention could not be entertained upon the ground that he was not matriculated.

It is true that Monahan was subsequently released. How he was released has never been officially communicated to me. He informed me that the judge sent for him and said to him that "he had been honorably acquitted," but that he had had no trial of any kind. He also stated to me that to his discharge it was added that should the superior court disapprove of the proceedings of the lower court he was to present himself before the tribunal again.

"(5) 'Whether the Mexican law denies the validity of any evidence of alien status save that presented by the certificate of matriculation. If not—

"(6) 'What evidence of citizenship may be presented to establish the fact of alienage?'

"The want of a certificate of matriculation has been considered sufficient to deny the right of diplomatic intervention, and therefore it appears to me that the decrees, or rather the action of the authorities thereunder, denies the validity of any evidence of alien status other than matriculation, and that none other would be admitted to establish it. I have, however, never had occasion to test this, no case of the kind having ever occurred. You will have observed from the text of the decrees that even a certificate of matriculation is not available to the person in whose behalf it has been issued for any matter which occurred anterior to the date of the certificate of matriculation. * * *

"(7) 'A list of the cases in which, on proof of citizenship according to the laws of the United States, diplomatic intervention has been rejected because of non-matriculation.'

"There are no such cases. The citizenship of the parties in whose behalf diplomatic intervention has been attempted has never been questioned. The Mexican Government, in such instances, has only considered it necessary to deny diplomatic intervention on the ground that the party in whose aid it was invoked had not previously been matriculated. * * *

"The records of this legation show that since the publication of the Mexican matriculation decrees two hundred and fifty-five citizens of the United States have been matriculated at the foreign office, and of these one hundred and twenty-four have been matriculate since the year 1880. This represents but a fraction of our citizens who are, or who have been during the period stated, in this country. The decrees are municipal regulations, and few of our countrymen coming here know of their existence. * * *

"I have never failed, when the opportunity presented itself, of explaining to our fellow-citizens who have called at the legation the Mexican contention upon this subject, and to advise them, in order to avoid any possible difficulty, to comply with the requirements of the decrees. This I have done, not because I have ever entertained the opinion that their right to the intervention of their Government depended upon a compliance on their part with the requirements of the decree in question, but simply as a means of preventing any possible discussion thereon.

"The position in which citizens of the United States in Mexico may be placed if the contention of the Mexican Government be admitted is a painful and a difficult one. It would be, under certain circumstances, absolutely impossible for them to obtain, in their direst need, the diplomatic protection of their Government. For instance, suppose (as I have already indicated) one of them were to come into the country provided with a passport from the Department of State, and immediately upon

his crossing the frontier he were to be taken possession of and confined in prison, charged with the commission of some offense, or mustered into the army; the intervention of this legation would not be accepted in his behalf, because he had not matriculated as a foreigner. For you will have observed that the question of citizenship is not the one with which the Mexican Government concerns itself. It does not look beyond the fact of matriculation, and bases its refusal to admit diplomatic interference on the ground of non-matriculation alone. It is true that in certain instances of imprisonment and impressment into the army this position has not been taken, but in others it has, notably in the cases of claims made by citizens of the United States, or their heirs, for damages arising from torts committed on them. * * * It is also true that instances have occurred when, notwithstanding the denial of the right of intervention, the intervention has been successful."

Mr. Morgan to Mr. Frelinghuysen, Sec. of State, Jan. 12, 1885. MSS. Dispatches, Mex.; For. Rel., 1885.

"I have to acknowledge the receipt of your No. 962, of the 12th ultimo, in reply to the inquiries of this Department respecting the matriculation laws of Mexico. The Department has read with interest your careful review of the subject. It appears that matriculation of foreigners consists in registering their names and nationality in the foreign office of Mexico.

"The Mexican Government contends that the national character of the foreigner is proved by this matriculation, which entitles him to special privileges and obligations, called the rights of foreigners. These are (1) the right to invoke the treaties and conventions existing between his country and Mexico; (2) the right to seek the protection of his own Government.

"They further contend that the want of a certificate of matriculation will be considered sufficient to deny to this Government the right of diplomatic intervention in any case.

"Against this contention this Government protests as an interference in its relations to its citizens. The Government of the United States recognizes the right of Mexico to prescribe the reasonable conditions upon which foreigners may reside within her territory, and the duty of American citizens there to obey the municipal laws; but those laws cannot disturb or affect the relationship existing at all times between this Government and one of its citizens. The duty is always incumbent upon a Government to exercise a just and proper guardianship over its citizens, whether at home or abroad. A municipal act of another state cannot abridge this duty, nor is such an act countenanced by the law or usage of nations. No country is exempted from the necessity of examining into the correctness of its own acts. A sovereign who departs from the principles of public law cannot find excuse therefore in his own municipal code. This Government, being firmly convinced that the position of the Mexican Government is untenable, cannot assent to it.

"You will so inform the minister for foreign affairs in such form as you may deem proper."

Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, Dec. 20, 1884. MSS. Inst., Mex.; For. Rel., 1885.

"There may arise two difficulties, as you will readily understand, in the way of presenting this case hopefully to the Government of Mexico:

"First. That E—— may not be matriculated as an American citizen. If not so registered Mexico may, as usual, deny the right of this Government to intervene diplomatically in his behalf. Although our position on this point is well understood by Mexico, and is that a Mexican municipal law cannot abridge the right of a foreign Government to protect one of its citizens, in case of need, that Government frequently sets up the plea of non-matriculation, and thereby seeks to neutralize the duty of this Government towards a citizen.

"Second. By the terms of railroad grants in Mexico, it is believed that officers and employés of the roads, within Mexican territory, are declared amenable to the laws as *Mexicans*, and are inhibited from pleading rights of alien protection and usage, *even if matriculated.* Their taking such service in Mexico is there deemed to be a contract, a condition of which is the surrender by them of the right to claim the protection of their own Government. I am not prepared to admit that such a waiver annuls the relation of the citizen to his own Government, and I certainly cannot think that it extinguishes the obligation of this Government to protect its citizens in Mexico in the event of a denial of justice. Giving the contract its fullest scope, it can certainly mean no more than that the persons so bound are admitted to be entitled to *justice* in lieu of the broader claim to international justice, and in case of a denial of justice the obligation of this Government to protect them remains unimpaired."

Mr. Bayard, Sec. of State, to Mr. Morgan, May 26, 1885. MSS. Inst., Mex.

By a note dated June 16, 1886, Mr. Romero, minister from Mexico, informed Mr. Bayard, Secretary of State, that "the laws which prescribed the matriculation of foreigners" have been repealed, "leaving it optional with foreigners residing in Mexico to request a certificate of their nationality, which will be issued to them by the secretary of foreign relations."

MSS. Notes, Mex. Leg.

"I am in receipt of a copy of the law of 28th May, sent hither by the United States legation in Mexico, and a perusal of its text confirms the gratifying impression conveyed by your note, that the substitution of an optional registration of foreigners as presumptive evidence of their status, in place of compulsory matriculation as the sole condition of proving alien status in Mexico, and enjoying international rights pertaining to such status, will remove the grounds of complaint which have heretofore obstructed the friendly consideration of international questions by the two Governments.

"I observe, however, that the same section, the 39th, to which you refer, provides that 'the definite proof of determinate nationality shall be made before the competent courts and by the means established by the laws or treaties.' Reserving the point until it shall be better understood, I may express my confidence that nothing in Mexican domestic legislation, or in the judicial proceedings thereunder, will be found calculated to impair, as the compulsory system of matriculation has heretofore appeared to do, the reciprocal right and duty of a citizen of the United States in respect of the national protection to which he is entitled and the allegiance he owes."

Mr. Bayard, Sec. of State, to Mr. Romero, June 19, 1886. MSS. Notes, Mex.

For incidental notices of "matriculation" see *supra*, § 171.

As to limitations upon foreigners in Mexico, see Consular Reports on Commercial Relations, 1883, No. 31, 688 *ff*.

As to Salvador matriculation, see App., vol. iii, § 172*a*.

II. *NATURALIZATION.*

(1) PRINCIPLES AND LIMITS OF.

§ 173.

The joint resolution of Congress, of July 27, 1868, affirming the right of expatriation, is given *supra*, § 171.

The acts of Congress limiting naturalization are in the Revised Statutes, sections 2165–2174.

The Fourteenth Amendment to the Constitution of the United States does not give a specific enumeration of citizens of the United States. It merely prescribes that "all persons born," etc., "are citizens." The object of the amendment was not to logically define citizenship, but to extend citizenship to certain classes whose citizenship had been previously questioned, and to place all citizens under distinctively Federal protection.

"It can admit of no doubt that the naturalization laws of the United States contemplate the residence in the country of naturalized citizens, unless they shall go abroad in the public service, or for temporary purposes."

Mr. Webster, Sec. of State, to Mr. Porter, Aug. 26, 1842. MSS. Inst., Turkey.

"The 12th section of the act of March 3, 1813, for the regulation of seamen on board the public and private vessels of the United States, provides 'that no person who shall arrive in the United States from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States who shall not for the continued term of five years next preceding his admission as aforesaid, have resided within the United States, without being at any time during the said five years out of the United States.'

"Under this statute it was held that any absence from the United States, however short, during the five years, even the landing from a steamboat in Canada, would prevent the applicant from obtaining his naturalization. Such an interpretation of it was deemed a hardship,

and to deprive the law of this stringent feature, the act of June 26, 1848, was passed, repealing the words 'without being during the said five years out of the territory of the United States,' found in the last clause of the section above referred to.

"The law as it now stands therefore requires that the applicant in order to be entitled to naturalization must have resided within the United States for the *continued* term of five years next preceding his admission as a citizen. This language wholly excludes the idea that the person may be allowed to go to another country and there make his domicil as long as it may suit his convenience, and then return to the United States and avail himself of the time he had previously resided within their territory."

Mr. Marcy, Sec. of State, to Mr. Fay, Mar. 22, 1856. MSS. Inst., Switz.

"Congress by repealing, in 1848, that part of the 12th section of the act of March 3, 1813, which made it a requisite to naturalization that the alien 'during the continued term of five years next preceding his admission, should not have been at any time out of the territory of the United States,' must be supposed to have intended that nothing further should be exacted than five years' residence in the general legal sense." * * *

"A person exceptionally naturalized by reason of his service as a soldier, upon proof of one year's residence, is obviously not within the protection of the convention with the North German Union unless he has resided five years within the United States, but in respect to the question of what constitutes residence and when it is to be deemed interrupted, or when he shall be regarded as having renounced his allegiance to the United States, he is to be judged in the same manner as other naturalized citizens."

Mr. Fish, Sec. of State, to Mr. Bancroft, Sept. 20, 1870. MSS. Inst., Prussia.

A State court, being entitled to issue a certificate of naturalization, is not within the purview of the circular of January 10, 1871, which prescribes that certificates of citizenship by State, municipal, or local officers are to be regarded as invalid.

Mr. Fish, Sec. of State, to Mr. Jay, Mar. 18, 1872. MSS. Inst., Austria.

"It is apprehended, however, that the Moorish Government may be mistaken, if it supposes that the effect of the naturalization of the person adverted to, supposing it to having taken place, would be to weaken his liability for his debts in Morocco, even if he should return to that country. He might, in that case, be prosecuted for them in the consular court, and this Government is bound to presume that impartial justice would there be dispensed."

Mr. Fish, Sec. of State, to Mr. Mathews, Oct. 23, 1872. MSS. Inst., Barb. Powers.

An alien who has served as a soldier can only avail himself of the privileges of section 2166 of the Revised Statutes by personal applica-

tion to one of the proper courts of justice, upon the declaration and proof required by the statute.

Mr. Blaine, Sec. of State, to Mr. O'Neill, Nov. 15, 1881. MSS. Dom. Let.

The Government of the United States "cannot admit of qualified naturalization, subject to the consent of the country of origin, neither could our courts, in which the judicial power of naturalization is vested by law, take cognizance of the consent of a foreign state as a precedent to naturalization."

Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, Oct. 19, 1882. MSS. Inst., Switz. See *supra*, § 172.

"When an alien applies to be admitted to citizenship in this country, having undergone the probation, and in all other respects complied with the laws on the subject of naturalization, and in open court solemnly avows his allegiance to the United States, and with the same solemnity renounces his allegiance to every other Government, and especially to that of the country of his birth, and is found to be of good moral character, he is admitted to such citizenship; and is thenceforth clothed and invested with the same rights and privileges that pertain to native citizens of the country, and entitled to the same degree of protection, whether abroad or at home. This is the condition of Mr. Meyer, and this Government would fall short of the duty which it owes to its citizens if it failed in the application of this traditional doctrine of the Republic to his case in connection with the present incident."

Same to same, July 28, 1883; *ibid.*

"Our existing naturalization laws also need revision. Those sections relating to persons residing within the limits of the United States in 1795 and 1798 have now only a historical interest. Section 2172, recognizing the citizenship of the children of naturalized parents, is ambiguous in its terms and partly obsolete. There are special provisions of law favoring the naturalization of those who serve in the Army or in merchant vessels, while no similar privileges are granted those who serve in the Navy or the Marine Corps.

"'An uniform rule of naturalization,' such as the Constitution contemplates, should, among other things, clearly define the status of persons born within the United States subject to a foreign power (section 1992) and of minor children of fathers who have declared their intention to become citizens but have failed to perfect their naturalization. It might be wise to provide for a central bureau of registry, wherein should be filed authenticated transcripts of every record of naturalization in the several Federal and State courts, and to make provision also for the vacation or cancellation of such record in cases where fraud had been practiced upon the court by the applicant himself or where he had renounced or forfeited his acquired citizenship. A just and uniform law in this respect would strengthen the hands of the Govern-

ment in protecting its citizens abroad, and would pave the way for the conclusion of treaties with foreign countries."

President Arthur, Fourth Annual Message, 1884.

"Questions concerning our citizens in Turkey may be affected by the Porte's non-acquiescence in the right of expatriation and by the imposition of religious tests as a condition of residence, in which this Government cannot concur. The United States must hold, in their intercourse with every power, that the status of their citizens is to be respected and equal civil privileges accorded to them without regard to creed, and affected by no considerations save those growing out of domiciliary return to the land of original allegiance, or of unfulfilled personal obligations which may survive, under municipal laws, after such voluntary return.

"The inadequacy of existing legislation touching citizenship and naturalization demands your consideration. While recognizing the right of expatriation, no statutory provision exists providing means for renouncing citizenship by an American citizen, native born or naturalized, nor for terminating and vacating an improper acquisition of citizenship. Even a fraudulent decree of naturalization cannot now be canceled. The privilege and franchise of American citizenship should be granted with care, and extended to those only who intend in good faith to assume its duties and responsibilities when attaining its privileges and benefits; it should be withheld from those who merely go through the forms of naturalization with the intent of escaping the duties of their original allegiance without taking upon themselves those of their new status, or who may acquire the rights of American citizenship for no other than a hostile purpose toward their original Governments. These evils have had many flagrant illustrations. I regard with favor the suggestion put forth by one of my predecessors, that provision be made for a central bureau of record of the decrees of naturalization granted by the various courts throughout the United States now invested with that power.

"The rights which spring from domicile in the United States, especially when coupled with a declaration of intention to become a citizen, are worthy of definition by statute. The stranger coming hither with intent to remain, establishing his residence in our midst, contributing to the general welfare, and by his voluntary act declaring his purpose to assume the responsibilities of citizenship, thereby gains an inchoate status which legislation may properly define. The laws of certain States and Territories admit a domiciled alien to the local franchise, conferring on him the rights of citizenship to a degree which places him in the anomalous position of being a citizen of a State and yet not of the United States, within the purview of Federal and international law. It is important within the scope of national legislation to define

this right of alien domicile as distinguished from Federal naturalization."

President Cleveland, First Annual Message, 1885.

"In reply to your letter of August 31, 1885, stating that you are a native-born subject of Great Britain, that you came to this country in 1883, being then 16 years old, and asking whether you are not entitled to the full rights of an American citizen and to hold the position of deputy clerk, I have to say that naturalization is a judicial act performed under the statute by a court of record having a clerk and a seal. The executive branch of the Government cannot prescribe the action of any court on a given application, but it may be observed that it is probable that any judge, to whom you apply to be naturalized after attaining full age and having continuously resided in the United States for five years, would deem the provisions of section 2167 of the Revised Statutes applicable to your case as you now describe it."

Mr. Bayard, Sec. of State, to Mr. Stuart, Sept. 9, 1885. MSS. Dom. Let.

"The section before us [§ 2167, Rev. Stat.], to which you particularly allude, applies, so I hold, to an alien 'who has resided in the United States three years next preceding his arrival at the age of twenty-one years, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof.' Such a person 'may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, be admitted a citizen of the United States' under the conditions afterwards stated. The object of this provision is to enable a person who has resided in the United States five years, but who, from the fact of being a minor, has not been competent to make a declaration, to make his declaration at the expiration of such five years, and be at once naturalized, provided that, at the time of his naturalization, he is of full age. In such case his declaration is to be made 'at the time of his admission to citizenship, which is to be construed as meaning simultaneously with his naturalization.

"It is thus intended to offer the franchise of naturalization to all persons, who, on arriving at full age, have resided in the United States five years before that period. And even were the question doubtful, it is, as you are well aware, a familiar rule that in the construction of grants of franchises, that construction is to be adopted which is most favorable to the persons for whose benefit the franchise is to be granted—*in dubio mitius.*"

Mr. Bayard, Sec. of State, to Mr. von Alvensleben, Mar. 15, 1886. MSS. Notes, Germ.

That the power to pass naturalization laws is exclusively in Congress, see Chirac *v.* Chirac, 2 Wheat., 259; U. S. *v.* Villato, 2 Dall., 370; Thurlow *v.* Massachusetts, 5 How., 573, 585; Norris *v.* Boston, 7 How., 518, 556; Golden *v.* Prince, 3 Wash., 314. Compare Collet *v.* Collet, 2 Dall., 294; Dred Scott *v.* Sandford, 19 How., 393.

There is under the Constitution no distinction between native and naturalized citizens.

Osborn *v.* United States Bank, 9 Wheat., 738.

The naturalization act of April 14, 1802, did not require the time of arrival in the United States to be proved by the certificate of the report of the alien to the court; other evidence thereof was admissible, and the decree of naturalization was not required to notice the certificate. The decree, being in due form, was conclusive evidence of the party. The act of March 22, 1816, which required the certificate to be recited in the decree is not an explanation, but an alteration, of the law of 1802.

Spratt *v.* Spratt, 4 Pet., 393.

A citizen of the United States residing in any State of the Union is a citizen of that State.

Gassies *v.* Ballon, 6 Pet., 761.

"We have in our political system a government of each of the several States and a Government of the United States. Each one of these governments is distinct from the other, and has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from those he has under the other."

Waite, C. J.; U. S. *v.* Cruikshank, 92 U. S., 542.

The Government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. "All that cannot be so granted or secured are left to the exclusive protection of the States."

Ibid.

In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue.

Hauenstein *v.* Lynham, 100 U. S., 483.

The mere right of suffrage given by a State law does not create citizenship.

U. S. *v.* Rhodes, 1 Abb. U. S., 28, 40.

"A person may be a citizen of the United States, and not a citizen of any particular State. This is the condition of citizens residing in the District of Columbia and in the Territories of the United States, or who have taken up a residence abroad, and others that might be mentioned. A fixed and permanent residence or domicil in a State is essential to the character of citizenship that will bring the case within the

jurisdiction of the Federal courts, as will appear from the cases already referred to."

Nelson, J.; Prentiss *v.* Brennan, 2 Blatch., 164, 165.

The expression "Armies of the United States," as used in the acts of Congress with respect to naturalization, and particularly section 20 of the act of 1862 (12 Stat. L., 597; Rev. Stat., § 2166), does not include marines or sailors.

Bailey *in re*, 2 Sawyer, 200.

But in Stewart *in re*, 7 Robins. (N. Y.), 635, it was said by McCunn, J.: "Where a person making application to be naturalized furnishes proof of good moral character, of one year's residence within the United States, and that he is of the age of twenty-one years and upward, and shows that he was regularly enlisted in the United States Navy, where he served as an enlisted man, and that he has been honorably discharged from the service; these facts bring his case within the provision of section 21 of the act of Congress approved July 17, 1862 (Rev. Stat., § 2166), so as to entitle him to naturalization by virtue of that statute. The word *armies* as used in that act is *nomen generalissimum*, applying to both land and naval forces."

Naturalization signifies the act of adopting a foreigner and clothing him with the privileges of a native citizen or subject.

9 Op., 356, Black, 1859.

A person disfranchised as a citizen by conviction for crime under the laws of the United States can be restored to his rights as such by a free and full pardon from the President, and such pardon may be granted, after he has suffered the other penalties incident to his conviction, as well as before.

9 Op., 478, Black, 1860.

The United States may, by laws, fix or declare the conditions of citizenship within their territorial jurisdiction, and may confer the rights of citizenship everywhere upon persons who are not rightfully subject to the authority of any foreign Government; but they cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within their territory, interfere with the just rights of such nation to the government and control of its own subjects.

13 Op., 89, Hoar, 1869.

Where the subject is not regulated by treaty, no distinction can be made, with respect to protection abroad, between naturalized and native-born citizens of the United States. The domiciliation of a naturalized citizen of the United States in his native country would not of itself deprive him of his right to the protection of this Government.

14 Op., 295, Williams, 1873.

For discussion of the naturalization laws of the United States, see 1 Phill. Int. Law (3d ed.), 451; Lawrence com. sur droit int.; 3 Wheat., 183 *ff.*

The question of Chinese citizenship is discussed in some detail by Calvo, droit int. (3d ed.), vol. 2, 69, 70. This learned author, however,

rests on the assumption that the fourteenth amendment to the Constitution excepts from the general category of citizens by birth only children of ambassadors, and hence does not except children of Chinese. The language of the amendment is that "all persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States," &c. If Chinese, when born in the United States, are not, in the sense of this amendment, "subject to the jurisdiction thereof," they are not citizens by force of the amendment. It has, however, been judicially held that a child born in the United States to Chinese parents is a citizen of the United States. Look Tin Sing *in re*, 10 Sawyer, 353. Calvo, droit int. (3d ed.), vol. 2, 70, also notices that the terms of naturalization in the United States are more rigorous than they are in the principal countries of Europe; the United States statutes require, not merely an oath of allegiance, but the renunciation of all other allegiances, and especially to the sovereign of birth. As to Chinese, see further *infra*, § 197; *supra*, § 144.

(2) PROCESS AND PROOF.

§ 174.

"The recitals of the certificate of naturalization, a copy of which accompanies your dispatch, on this point are: 'That he resided in the United States three years next preceding his arriving at the age of twenty-one years, and has continued to reside therein to this time; and that he has resided within this State for one year preceding this date, and that he is twenty-one years of age, and that he has resided five years within the United States, including the three years of his minority.'

"I am of opinion that these conditions amount to a fulfillment of the requirements of the law in the class of cases to which that of R—— belongs. Statutes enlarging or conferring personal rights are to be construed liberally, in contradistinction to those which abridge or take away such rights. This liberal rule of judicial interpretation, in harmony as it is with our system of Government, has been, so far as I am aware, uniformly respected and followed by the executive branch of the Government."

Mr. Fish, Sec. of State, to Mr. Davis, Dec. 20, 1875; MSS. Inst., Germ.

As to provisions in respect to taking oath to support the Constitution of the United States and abjuring foreign allegiance, see Rev. Stat., section 2165, subd. 2; as to making proof of five years' residence in the United States and one year in a State or Territory, and of good moral character, etc., *ibid.*, subd. 3; and as to renouncing any title of nobility, *ibid.*, subd. 4.

That declaration of intention was not required, but certain substitute evidence might be accepted, from persons who resided here between June, 1798, and June, 1812, see Rev. Stat., section 2165, subd. 6; and so of aliens honorably discharged from the military service, section 2166; or from minor residents, section 2167.

The declaration of intention to become a citizen of the United States, required by Rev. Stat., section 2165, may be made by an alien before the

clerk of any of the courts named in said section, and all such declarations heretofore made before any such clerk are hereby declared as legal and valid as if made before one of the courts named in said section.

Act of Jan. 25, 1876, c. 4, 19 Stat. L., 2.

"A vessel is not entitled to be documented as a vessel of the United States, or, if so documented, to the benefits thereof, if owned, in whole or in part, by any person naturalized in the United States and residing for more than one year in the country from which he originated, or for more than two years in any foreign country, unless in the capacity of a consul or other public agent of the United States."

Treasury Regulations, 1884, p. 5; Rev. Stat., § 4134. See *infra*, §§ 468 *ff*.

The burden of proving naturalization is on a party setting up the citizenship of a person who, born abroad, removed to and died in the United States.

Hauenstein *v.* Lynham, 100 U. S., 483.

A court of record without a clerk or prothonotary, or other recording officer distinct from the judge of such court, is not competent to receive an alien's preliminary declaration of his intention to become naturalized.

Ex parte Cregg, 2 Curtis, 98; 3 Liv. L. Mag., 141; 7 L. Rep'r, N. S., 491.

Under Rev. Stat., section 2165, allowing naturalization before "any court of any of the States having common law jurisdiction and a seal and a clerk," it is not necessary that the court should have full and complete common law jurisdiction. If a court may exercise any part of common law jurisdiction, that is enough. (8 Metc., 168; 2 Curt., 98; 50 N. H., 245; 39 Car., 98; 3 Pet., 433, 446.) The city court of Yonkers, N. Y., can naturalize.

U. S. *v.* Power, 14 Blatch., 223.

Evidence of conviction of crime more than five years before application for naturalization, but after the arrival of the applicant at this country, will bar naturalization.

Spencer *in re*, 5 Sawy., 195.

In McCoppin's case (5 Sawyer, 630) the following opinion was given by Mr. Justice Field:

"This is an application on the part of Mr. McCoppin to this court 'to renaturalize him if, in its judgment, his former naturalization is defective or open to question.'

"It appears that on the 12th of December, 1864, the applicant was admitted as a citizen by the district court of the United States for this district. The record of the proceeding recites that the applicant at the time made a declaration of his intention to become a citizen, and proved by the oaths of P. H. Cannavan and Lafayette Maynard, citizens of the United States, his residence within the United States for the previous five years, and for the three years next preceding his arrival at the age of twenty-one years, and his residence in California for one year, and that

during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, and that he took the customary oath to support the Constitution and renounce all allegiance and fidelity to every foreign power.

"The applicant states that he was born in Ireland on the 4th of July, 1834, and at the time he made his application to be admitted as a citizen he was under the impression that he had arrived in the United States in 1852; but in this respect he is now satisfied he was mistaken, and that he arrived in 1853; that his father arrived at the same time and afterwards became a citizen; that he himself declared his intention to become a citizen in the court of common pleas, for the city and county of New York, on the 18th of June, 1857, and produces a certified copy of the declaration; that subsequently he was advised, and for some years believed, that he was entitled to citizenship by reason of his nonage at the time of his arrival in the United States and the subsequent naturalization of his father; and that when informed of his error in this particular, he made formal application for admission to the district court.

"The application in this case is an unusual one, but, under the circumstances, a very proper one, though we think if the district court were in session, that it might with more propriety have been made to that court.

"The applicant is the mayor of the city of San Francisco, and his citizenship is, therefore, a matter of public interest. The law implies that the officers of the municipality are citizens of the United States, and it was certainly under the belief that the applicant was a citizen, that he received the suffrages of the people of the city, and was installed into office. If, therefore, the proceeding by which he claims his citizenship is invalid or open to question, it is quite natural that he should desire that a new proceeding may be taken to establish his citizenship beyond a doubt. No such proceeding, however, is necessary. The record of naturalization in his case is perfect and the judgment valid. Its validity and efficacy are in no respect impaired by the inaccurate statement in the recitals respecting the three years' residence in the United States of the applicant previous to his attaining the age of twenty-one. The recitals constitute no part of the judgment, and whether correct or otherwise, is immaterial. The court was satisfied at the time of the sufficiency of the evidence presented to justify the admission of the applicant and pronounced its judgment accordingly.

"Undoubtedly the court might, in a proper case, set aside its judgment admitting a party to citizenship, if the party was not at the time entitled to admission and the court had reason to believe that it had been intentionally deceived. But in this case there is no ground to suppose any deception was intended, or for any imputation upon the motives of the applicant. He was at the time entitled to be admitted as a citizen

on other grounds. He had declared his intention to become a citizen in one of the courts of record in the city of New York seven years before, and had resided in the United States for five years. This latter fact was established at the time before the district court and is stated in the record. Upon these facts and the other matters as to character and attachment to the principles of the Constitution, proved by the witnesses present, he could have been as readily admitted as upon the grounds stated."

(3) JUDGMENT OF, CANNOT BE IMPEACHED COLLATERALLY, BUT IF FRAUDULENT MAY BE REPUDIATED BY GOVERNMENT.

§ 174*a*.

When a naturalization certificate shows error on its face, and when, on applying to the clerk of the court granting it, it appears to have been granted erroneously, it will be treated as a nullity by the Department.

Mr. Marcy, Sec. of State, to Mr. Vroom, May 23, 1854. MSS. Inst., Prussia.

"Cautious scrutiny is enjoined in such cases, because evidence has been accumulating in this Department for some years that many aliens seek naturalization in the United States without any design of subjecting themselves by permanent residence to the duties and burdens of citizenship, and solely for the purpose of returning to their native country and fixing their domicil and pursuing business therein, relying on such naturalization to evade the obligations of citizenship to the country of their native allegiance and actual habitation. To allow such pretensions would be to tolerate a fraud upon both the Governments, enabling a man to enjoy the advantages of two nationalities and to escape the duties and burdens of each."

Mr. Fish, Sec. of State, to Mr. Motley, Oct. 14, 1869. MSS. Inst., Gr. Brit.

"The record of naturalization ought certainly to be received as *prima facie* evidence of the facts which it recites. It is not, however, conclusive. Upon this point I give, for your information and guidance, the following extract from the opinion of the Attorney-General, under date of January 21, 1871, upon the case of a naturalized citizen of German birth, submitted to this Department by our minister to Berlin:

"'He was naturalized in the United States district court for Connecticut on the 27th day of March, 1869. The record recites that he had resided constantly in the United States for more than five years. If this recitation were conclusive, his right to protection under the treaty would be established. The record establishes the general fact of his naturalization and of his right to be recognized here as an American citizen in all domestic transactions. But recitations in the record of matters of fact are binding only upon parties to the proceedings and their privies. The Government of the United States was no party, and stands in privity with no party, to these proceedings; and it is not in

the power of Mr. Stern by erroneous recitations in *ex parte* proceedings to conclude the Government as to matters of fact.

"'The record also recites that he had enlisted in the Army of the United States in 1865, and had been honorably discharged the same year. This fact has no bearing upon the matter in hand, because naturalization, unless accompanied by a five-years' residence in the adopted country, confers no rights under the treaty.

"'Hence I am of opinion that Mr. Stern, though regularly naturalized in the United States, not having had an uninterrupted residence of five years here, is not entitled to the immunities guaranteed by the treaty with North Germany of 1868.'

"I have only to add that in the case to which the above extract relates the evidence impeaching the recitals in the record of naturalization was derived by Mr. Bancroft from the deliberate admissions of the party himself, corroborated by the statements of others cognizant of fact."

Mr. Fish, Sec. of State, to Mr. Wing, Apr. 6, 1871. MSS. Inst., Ecuador.

"It is deemed important to call your attention to the laws and foreign office regulations of the Mexican Government in regard to the matriculation, so-called, of foreigners in that country, which cannot be acquiesced in by this Government. It seems that a distinction is made between native and naturalized citizens of the country who may seek matriculation. The passport, say of this Department, is respected when issued to those born here, but the Mexican Government assumes the right to inquire into the authenticity of certificates issued to naturalized citizens of the United States, and, therefore, will not respect the passports of this Department issued to such citizens. In this that Government may be regarded as showing a want of comity, at least, which was not to have been expected. It is possible, however, that the distrust shown as to our certificates of naturalization may have sprung from an impression that they are carelessly issued without due regard to the facts stated on their face. This distrust is believed to be quite unfounded, and to have very few instances in its support, and those mainly arising from such accidents as are inseparable under the best system from the multiplicity of naturalization cases.

"A naturalization of a foreigner in the United States is the solemn act of a court of record. As such, no foreign Government can rightfully question its sufficiency or inquire into the facts upon which it may have been based. A copy of the regulations of this Department in regard to passports is herewith transmitted. It will be seen from them that the greatest care is taken to prevent imposition by persons asking for passports as citizens. In the case of naturalized citizens, the presentation of the certificate of naturalization is required. The passport on its face does not make any distinction between native and naturalized citizens, and it is conceived that no foreign Government can without discourtesy,

at least, to the head of this Department, attempt to make such a distinction.

"You will consequently address a remonstrance and protest upon this subject to the Mexican minister for foreign affairs.

"It may be said further that the law and regulations adverted to seem to ignore the fact as to the large number of persons in the United States who were naturalized by the treaty of Guadalupe-Hidalgo. This Government has no disposition to assert rights of citizenship for any who may not lawfully be entitled to them. It cannot, however, allow any foreign Government to sit in judgment upon that question."

Mr. Fish, Sec. of State, to Mr. Nelson, Feb. 13, 1872. MSS. Inst., Mexico; For. Rel., 1872. As to matriculation see further, *supra*, § 172a.

Prosecutions may be directed for perjury against parties making false oath to naturalization papers.

Mr. Fish, Sec. of State, to Mr. Williams, Nov. 19, 1872. MSS. Dom. Let.

"I have again to call the attention of Congress to the unsatisfactory condition of the existing laws with reference to expatriation and the election of nationality. Formerly, amid conflicting opinions and decisions it was difficult to exactly determine how far the doctrine of perpetual allegiance was applicable to citizens of the United States. Congress by the act of the 27th of July, 1868, asserted the abstract right of expatriation as a fundamental principle of this Government. Notwithstanding such assertion, and the necessity of frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation, or when a citizen shall be deemed to have renounced or to have lost his citizenship. The importance of such definition is obvious. The representatives of the United States in foreign countries are continually called upon to lend their aid and the protection of the United States to persons concerning the good faith or the reality of whose citizenship there is at least great question. In some cases the provisions of the treaties furnish some guide; in others it seems left to the person claiming the benefits of citizenship, while living in a foreign country, contributing in no manner to the performance of the duties of a citizen of the United States, and without intention at any time to return and undertake those duties, to use the claims to citizenship of the United States simply as a shield from the performance of the obligations of a citizen elsewhere. * * * Frequent instances are brought to the attention of the Government of illegal and fraudulent naturalization, and of the unauthorized use of certificates thus improperly obtained. In some cases the fraudulent character of the naturalization has appeared upon the face of the certificate itself; in others, examination discloses that the holder had not complied with the law; and in others, certificates have been obtained where the persons holding them not only were not entitled to be naturalized, but had not even been within the United States at the time of the pretended

naturalization. Instances of each of these classes of fraud are discovered at our legations, where the certificates of naturalization are presented, either for the purpose of obtaining passports or in demanding the protection of the legation. When the fraud is apparent on the face of such certificates they are taken up by the representatives of the Government and forwarded to the Department of State. But even then the record of the court in which the fraudulent naturalization occurred remains, and duplicate certificates are readily obtainable. Upon the presentation of these for the issue of passports, or in demanding protection of the Government, the fraud sometimes escapes notice, and such certificates are not infrequently used in transactions of business to the deception and injuiry of innocent parties. Without placing any additional obstacles in the way of the obtainment of citizenship by the worthy and well-intentioned foreigner who comes in good faith to cast his lot with ours, I earnestly recommend further legislation to punish fraudulent naturalization and to secure the ready cancellation of the record of every naturalization made in fraud."

President Grant, Sixth Annual Message, 1874.

"I have the honor to acknowledge the receipt of your note of the 31st ultimo, inclosing—*sub petitione remissionis*—the certificates of naturalization as citizens of the United States of Jacob Kastellan and Herman Kastellan, former subjects of Prussia.

"The certificates bear dates, respectively, the 12th of January and the 13th of February, 1871, and your note conveys the information that in the same year, 1871, the Messrs. Kastellan returned to Prussia, and settled at Koshmin, in the province of Posen, their native place.

"It appears, also, that after the return of the brothers Kastellan to Koshmin certain inquiries were instituted by the local authorities of that place in relation to their citizenship, and that in response to the inquiries Jacob Kastellan stated that he received his discharge as a Prussian citizen from the Government of Posen in 1866, and left for the United States in the month of May of that year; that Herman declared that he received his discharge from the same authority in 1867, and that he left for the United States in the same year; and you further state that official inquiry made at the Government of Posen verified the correctness of these statements as to the date of the respective discharges, Jacob Kastellan having, as it is alleged, received his on the 20th of February, 1866, and that of Herman having been granted on the 6th of May, 1867.

"These subsequent statements and facts appearing to be incompatible with the declaration of the certificates to the effect that each of the parties in question had resided in the United States five years previous to his naturalization, you desire to be informed, first, whether the certificates are valid before the laws of the United States, and, second,

whether on the strength of these documents Jacob and Herman Kastellan are recognized by this Government as American citizens.

"These inquiries involve a question of the gravest judicial character. The two papers which I had the honor to receive with your note are certificates of regular decrees purporting to have been rendered by courts of general jurisdiction, and are accompanied with the ordinary evidence recognized by the laws of the United States as attesting the genuineness of solemn documents emanating from such tribunals; they are received as verities in all other courts of the United States and of the several States, and accepted with like credit by the executive branch of the Government.

"It appears, moreover, that these certificates expressly state that the fact of the required previous residence was proved to the satisfaction of the court, and it will be remembered that the law requires proof to be furnished in such cases by the oath of the party and other sworn testimony in corroboration thereof.

"What the precise evidence submitted in the case under consideration may have been this Department is not informed, but the presumption of correctness and regularity which obtains in relation to proceedings in judicial tribunals, under the laws of the United States, is equally applicable to naturalization proceedings, and applies to them with full force.

"By the decree, therefore, of a competent court, after a hearing upon sworn testimony and with the parties before the court, it has been adjudged that these applicants for citizenship had complied with the law, as to residence and otherwise, and that they were legally admitted to citizenship.

"Such an adjudication affects the rights and property of individuals and their children, and may seriously affect a change in the rights or interest of third parties.

"To assume to question the legality or binding force of such a decree upon statements afterward made by the parties or obtained from other sources would practically amount to the annulling of such decree affecting all these classes of persons, upon statements not under oath, taken *ex parte*, and without a hearing on the question.

"If the political department of the Government may, from time to time, pass upon such questions according to the apparent credibility of the particular evidence offered to impeach the decree, or the varying statement of an interested party, no uniformity of decision or security for acquired rights could exist.

"In view of all these considerations, I have the honor to inform you that under the circumstances, and in the case you state, certificates of naturalization, valid on their face and founded on the decree of a competent court, cannot be questioned except through judicial proceedings instituted for the purpose, or in which the correctness of the facts formerly passed upon may properly be adjudicated, and that it is not

within the province of the political department of the Government to anticipate what would be the result of a judicial inquiry into the question."

Mr. Fish, Sec. of State, to Mr. Schlözer, Jan. 8, 1875. MSS. Notes, Germ.; For. Rel., 1875.

"Since the date of instruction No. 696, addressed to Mr. Nicholas Fish, the Department has taken the opinion of the Attorney-General upon the question as to how far a decree of naturalization made by a competent court may be questioned by proof that all of the legal requirements were not in fact complied with. The question discussed in that opinion has no reference to this particular case, because, R—— claimed to be considered a citizen under the treaty of 1868, which expressly provides that naturalization within the meaning of that treaty can only take place after a residence of five years in the United States. It is suggested, however, that where relief is sought from the German Government, and the naturalization appears to have been fraudulently obtained, it would be well to confine the reply to a refusal to interfere, without expressing any opinion upon the fact whether in any possible aspect, or in view of any other question the person can be regarded as a citizen."

Mr. Cadwalader, Acting Sec. of State, to Mr. Davis, Aug. 11, 1875. MSS. Inst., Germ.

"I recommend that some suitable provision be made, by the creation of a special court or by conferring the necessary jurisdiction upon some appropriate tribunal, for the consideration and determination of the claims of aliens against the Government of the United States which have arisen within some reasonable limitations of time, or which may hereafter arise, excluding all claims barred by treaty provisions or otherwise. It has been found impossible to give proper consideration to these claims by the Executive Departments of the Government. Such a tribunal would afford an opportunity to aliens other than British subjects to present their claims on account of acts committed against their persons or property during the rebellion, as also to those subjects of Great Britain whose claims, having arisen subsequent to the 9th day of April, 1865, could not be presented to the late commission organized pursuant to the provisions of the Treaty of Washington."

President Grant, Seventh Annual Message, 1875.

When the question of validity of a naturalization is in doubt, the presumption is "in favor of the rights and privileges of the citizen."

Mr. Fish, Sec. of State, to Mr. Davis, Dec. 20, 1875. MSS. Inst., Germ.

"The number of persons of foreign birth seeking a home in the United States, the ease and facility with which the honest emigrant may after the lapse of a reasonable time become possessed of all the privileges of citizenship of the United States, and the frequent occasions which in-

duce such adopted citizens to return to the country of their birth, render the subject of naturalization and the safeguards which experience has proved necessary for the protection of the honest naturalized citizen of paramount importance. The very simplicity in the requirements of law on this question affords opportunity for fraud, and the want of uniformity in the proceedings and records of the various courts, and in the forms of the certificates of naturalization issued, affords a constant source of difficulty.

"I suggest no additional requirements to the acquisition of citizenship beyond those now existing, but I invite the earnest attention of Congress to the necessity and wisdom of some provisions regarding uniformity in the records and certificates, and providing against the frauds which frequently take place, and for the vacating of a record of naturalization obtained in fraud.

"These provisions are needed in aid and for the protection of the honest citizen of foreign birth, and for the want of which he is made to suffer not infrequently. The United States has insisted upon the right of expatriation, and has obtained after a long struggle an admission of the principle contended for by acquiescence therein on the part of many foreign powers and by the conclusion of treaties on that subject. It is, however, but justice to the Government to which such naturalized citizens have formerly owed allegiance, as well as to the United States, that certain fixed and definite rules should be adopted governing such cases and providing how expatriation may be accomplished.

"While emigrants in large numbers become citizens of the United States, it is also true that persons, both native-born and naturalized, once citizens of the United States, either by formal acts or as the effect of a series of facts and circumstances, abandon their citizenship and cease to be entitled to the protection of the United States, but continue on convenient occasions to assert a claim to protection in the absence of provisions on these occasions."

President Grant, Eighth Annual Message, 1876. See App. vol. iii, § 174*a*.

"While the decisions concerning the binding force of a record of naturalization make it difficult to go behind the record; at the same time, whenever the Government is called upon for its interposition in a foreign state on behalf of any person claiming to be a naturalized citizen, the question whether, under all the facts presented by him, intervention should be accorded is always open for consideration."

Mr. Fish, Sec. of State, to Mr. Moran, Feb. 16, 1877. MSS. Inst., Portugal.

"It certainly is not competent for the Department of State, either by itself or through its delegated authority in the commission (United States and Spanish Commission), to go behind a judicial decision of a court of law, such as is a certificate of naturalization."

Mr. Evarts, Sec. of State, to Mr. Durant, Mar. 7, 1879. MSS. Dom. Let.

Fraudulent or defective naturalization papers cannot be made the basis of diplomatic interposition.

Mr. Evarts to Mr. White, Dec. 10, 1879. MSS. Inst., Germ. See same to same, Feb. 12, 1880; MSS. Inst., Germ.: Mr. Blaine to Mr. Everett, Oct. 11, 1881; *ibid.*: Mr. Bayard to Mr. Pendleton, Oct. 14, 1885; *ibid.*

A certificate of naturalization as a citizen of the United States cannot be impeached for fraud before an international commission.

Mr. Blaine, Sec. of State, to Mr. Durant, Apr. 22, 1881. MSS. Dom. Let. Same to same, Nov. 30, 1881; *ibid.* See comments in letters of Mr. Frelinghuysen, Sec. of State, to Mr. Suydam, Feb. 17, 1882; Apr. 17, 1882; *ibid.*

It is not within the power of the Secretary of State to vacate a decree of naturalization issued by a competent court of the United States.

Mr. Blaine, Sec. of State, to Mr. Hamlin, Dec. 6, 1881. MSS. Inst., Spain.

"In the opinion of the President the determination of the principles involving political rights, according to which disputed cases of citizenship arising before the commission are to be decided, belongs to the respective Governments, and not to the commission. This position Spain by her protest has clearly recognized. Having the highest respect for the learning and ability of the accomplished umpire, the President, without at the time expressing any opinion as to the result reached in the Buzzi case, cannot but feel that some of the principles affecting American citizenship announced in the opinion in that case are not in harmony with the agreement and are not such as he should concur in.

"There is no power in this Department, and none has been conferred on the commission, to examine into the good faith, that is, the motive, purpose, and object of the applicant in seeking naturalization. The only question in each case is whether the person claiming to be a naturalized citizen has been naturalized. There is no law of the United States requiring the applicant to disclose the motive which induces him to change his nationality; neither is there any power in this Department, nor any power conferred upon the commission, to inquire whether the applicant has been actually present in the United States for five years immediately preceding the naturalization. The Department of State has no power and has conferred on the commission no power to question the proceedings antecedent to the judgment of naturalization, with the single exception hereinafter mentioned, that an investigation may be made whether the proceedings were or were not fraudulent.

"The judgment of a court granting to an individual the rights of citizenship is entitled to receive the respect given to all other judgments rendered by courts of competent jurisdiction, and if not impeachable for fraud is conclusive as to all the facts necessarily passed upon. * * *

"It should in this connection be further observed that this Government exercises a broad discretion in determining what claims it will diplomatically present against other nations, and as its past history shows it never has lent its influence in favor of dishonest claims, so we may confidently

assert that it never will present the claim of one who has dishonestly imposed upon the courts of the country and fraudulently obtained a judgment of naturalization. A great nation must be jealous of its honor, and when in behalf of an individual it demands of another power payment of money, it should not close it doors against an investigation into the right of the claimant to take the money. Were the case reversed this Government could contend for the right of showing that the claimant was not honestly a citizen of the nation presenting the claim.

"To the honestly naturalized citizen is now secured the full enjoyment of the rights of a citizen of the United States, even in the country of his birth, because it is known that this Government will throw the ægis of its protection only over those entitled to it. Should we protect those who have by fraud obtained an apparent right of citizenship, the high dignity of that privilege would be degraded, and the position in foreign countries of those who have rightfully and honestly obtained it would be imperilled.

"The true rule to govern the commission is that when an allegation of naturalization is traversed and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, it can only be impeached by showing that the court which granted it was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on that topic, that fraud consisting of intentional or dishonest misrepresentation or suppression of material facts by the party obtaining the judgment was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law."

Mr. Frelinghuysen, Sec. of State to Mr. Hamlin, Sept. 22, 1882. MSS. Inst., Spain. See Mr. Frelinghuysen, Sec. of State, to Mr. Suydam, Dec. 14, 1882. MSS. Dom. Let.

"Under ordinary circumstances, where a *prima facie* record of citizenship, both of the father and the son, appears in the archives of the legation, untraversed by any adverse allegation, and where no motive of deception and fraud is apparent, the Department would be adverse to throwing on the applicant the perhaps needless and inconvenient burden of proving that the father actually and legitimately acquired the status of a citizen of the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. Langston, Aug. 13, 1883. MSS. Inst., Hayti.

The United States Government will not make naturalization papers which are on their face fraudulent the basis of a claim on a foreign sovereign.

Mr. Bayard, Sec. of State, to Mr. Francis, May 20, 1885. MSS. Inst., Austria; For. Rel., 1885.

Under the act of 1795 (1 Stat. L., 414, repealed), the administration of the oath of allegiance amounts to a judgment of the court for the ad-

mission of the applicant to the rights of a citizen, and implies that all prerequisites had been complied with.

Campbell *v.* Gordon, 6 Cranch, 176.

Naturalization is limited by statute to courts of record, and a naturalization judgment of such courts, if entered on record in due form, proves itself, and has the same conclusiveness as other judgments of courts of record.

Spratt *v.* Spratt, 4 Pet., 393; The Acorn, 2 Abb. U. S., 434.

The thirteenth section of the act of 1813, prescribing penalties for fraudulent naturalization, &c., was repealed by the act of July 14, 1870, which substituted other penalties.

U. S. *v.* Tynen, 11 Wall., 88.

Where the question is, under the treaty with Germany, whether there has been an uninterrupted residence in the United States, the recital in naturalization proceedings is not conclusive.

13 Op., 376, Akerman, 1871. See 14 Op., 154, Williams, 1872.

Naturalization in the United States, without an intent to reside permanently therein, but with a view of residing in another country, and using such naturalization to evade duties and responsibilities to which, without it, he would be subject, ought to be treated by this Government as fraudulent.

14 Op., 295, Williams, 1873.

The record showing that L. was admitted to citizenship July 10, 1873, by a State court having jurisdiction, and it being offered to show by a copy of the registry of births at Hamburg, where he was born, that he was born February 22, 1853, it was held that as the court having jurisdiction had found that the facts and conditions to entitle him to citizenship existed, such finding had the effect of a judgment, and was was conclusive.

14 Op., 509, Williams, 1874.

As to citizenship as a basis of claims against a foreign Government, see *infra*, § 215.

(4) MERE DECLARATION OF INTENTION INSUFFICIENT.

§ 175.

"From the statement of the case it is quite evident that Koszta was not, at the time he was kidnapped, a subject of the Emperor of Austria. He had withdrawn from his allegiance to the Austrian Government, and the course of that Government towards him was at least an implied consent to his withdrawal. By acts concurred in by both parties, the ties of allegiance were severed. He had renounced on his part, as Austria had on hers, all claims to reciprocal rights or duties resulting from their former political connection as sovereign and subject, and they stood

towards each other as if no such connection had ever existed. If, however, there had been some foundation for a claim by Austria, as under the obligation of allegiance to her, when he was seized at Smyrna, the case would not, perhaps, have been much changed; it would only have afforded some better pretext for the outrage than now exists, but would not have altered its character or legal consequences. While at Smyrna, Austria had no jurisdiction over the person of Koszta, nor do I understand that there was at the time of the seizure any pretense that it was made by Austrian authority in any legal form. * * *

"Whatever may have been Koszta's citizenship (not being a subject of the Ottoman Porte) he was, while at Smyrna, a Frank or sojourner, and might place himself under any foreign protection he chose to select, and the Turkish laws respect the rights he thus acquired. He did place himself under the protection of an American consul at Smyrna, and our legation at Constantinople, and was at once clothed with the nationality of the protecting power, and consequently became entitled to be regarded and respected while in that situation as a citizen of the United States. The American consul at Smyrna did nothing more than his duty in claiming for him the protection due to one of our citizens, and Captain Ingraham is justified by his Government for using the means he did for procuring his release from illegal imprisonment."

Mr. Marcy, Sec. of State, to Mr. Marsh, Aug. 26, 1853. MSS. Inst., Turkey. See Mr. Bayard, Sec. of State, to Mr. Crain, Jan. 28, 1886. MSS. Dom. Let.

"Martin Koszta, a Hungarian by birth, came to this country in 1850, and declared his intention, in due form of law, to become a citizen of the United States. After remaining here nearly two years, he visited Turkey. While at Smyrna he was forcibly seized, taken on board an Austrian brig of war, then lying in the harbor of that place, and there confined in irons, with the avowed design to take him into the dominions of Austria. Our consul at Smyrna and legation at Constantinople interposed for his release, but their efforts were ineffectual. While thus imprisoned, Commander Ingraham, with the United States ship of war Saint Louis, arrived at Smyrna, and, after inquiring into the circumstances of the case, came to the conclusion that Koszta was entitled to the protection of this Government, and took energetic and prompt measures for his release. Under an arrangement between the agents of the United States and of Austria, he was transferred to the custody of the French consul-general at Smyrna, there to remain until he should be disposed of by the mutual agreement of the consuls of the respective Governments at that place. Pursuant to that agreement he has been released, and is now on his way to the United States. The Emperor of Austria has made the conduct of our officers who took part in this transaction a subject of grave complaint. Regarding Koszta as still his subject, and claiming a right to seize him within the limits of the Turkish Empire, he has demanded of this Government its consent to the surrender of the prisoner, a disavowal of the acts of its agents, and satisfaction for

the alleged outrage. After a careful consideration of the case, I came to the conclusion that Koszta was seized without legal authority at Smyrna; that he was wrongfully detained on board of the Austrian brig of war; that at the time of his seizure he was clothed with the nationality of the United States, and that the acts of our officers, under the circumstances of the case, were justifiable, and their conduct has been fully approved by me, and a compliance with the several demands of the Emperor of Austria has been declined."

President Pierce, First Annual Message, 1853. See *infra*, § 198, where the right to protect Koszta is put on the grounds of domicil.

Declaration of intention to become a citizen does not, in the absence of treaty stipulations, so clothe the individual with the nationality of this country as to enable him to return to his native land without being subject to all the laws thereof.

Mr. Fish, Sec. of State, to Mr. de Lana, June 1, 1869. MSS. Dom. Let. Mr. Fish, Sec. of State, to Mr. Bennett, Dec. 24, 1872; *ibid.;* Mr. Fish, Sec. of State, to Mr. Jay, Apr. 2, 1875. MSS. Inst., Austria. Mr. Frelinghuysen, Sec. of State, to Mr. Foster, Apr. 2, 1883. MSS. Inst., Spain. Mr. Frelinghuysen, Sec. of State, to Mr. Fish, Apr. 23, 1883. MSS. Inst., Belgium. Mr. Frelinghuysen, Sec. of State, to Mr. Randall, Mar. 14, 1884. MSS. Dom. Let.

It is otherwise when the party making the declaration has acquired a domicil in this country, in which case the Government of the United States will protect him in all the rights which the law of nations attaches to domicil.

Printed Pers. Inst. Dip. Agents, 1885; *infra*, § 198.

Although a mere declaration of intention does not confer citizenship, yet, under peculiar circumstances, in a Mohammedan or semi-barbarous land, it may sustain an appeal to the good offices of a diplomatic representative of the United States in such land.

Mr. Cass, Sec. of State, to Mr. De Leon, Aug. 18, 1858. MSS. Inst., Barb. Powers. To this effect is the position taken by Mr. Marcy in preceding extracts, at the beginning of this section.

A declaration of intention to accept nationality may give the declarant the right to protection by the United States as against a third sovereign.

Mr. Frelinghuysen, Sec. of State, to Mr. Wallace, Mar. 25, 1884. MSS. Inst., Turkey. See same to same, Apr. 8, 1884; *ibid.*

"The criterion by which Koszta's and Burnato's cases are to be measured in examining questions arising with respect to aliens who have declared, but not lawfully perfected, their intention to become citizens of the United States, is very simple.

"When the party, after such declaration, evidences his intent to perfect the process of naturalization by continued residence in the United States as required by law, this Government holds that it has a right to remonstrate against any act of the Government of *original allegiance* whereby the perfection of his American citizenship may be prevented

by force, and original jurisdiction over the individual reasserted. Koszta and Burnato were both resident in the United States, and their absence was of that temporary character, *amino revertendi*, which does not conflict with the continuity of residence required by the statute. Koszta was arrested by the authorities of Austria in the dominions of a third state. Burnato, who had definitely abandoned Mexican domicile, was held for military service in Mexico on the occasion of a transient return.

"Mr. Walsh, however, as my predecessors have remarked, had given no proof of retention of American residence. On the contrary, immediately after his declaration of intention, he established a commercial domicile in Mexico under circumstances which would have sufficed to disrupt his continued residence in the United States and prevent his naturalization under the statute.

"By so removing to Mexico, he must be deemed to have abandoned his declared intention to become an American citizen."

Mr. Bayard, Sec. of State, to Mr. Mackey, Aug. 5, 1885. MSS. Dom. Let.

"So far as political rights are concerned, a mere declaration of intention to become a citizen of the United States would give Abdellah Saab no title to claim the intervention of the United States should he return to his native land. If, however, he is domiciled in the United States, though not naturalized, the Government of the United States would be ready to assert for him any municipal rights which by the law of nations are assigned to domicile."

Mr. Bayard, Sec. of State, to Mr. Williams, Oct. 29, 1885. MSS. Dom. Let. See Mr. Bayard to Mr. Crain, Jan. 28, 1886; *ibid.* As to domicil, see *infra*, § 198. That widow and children of declarant become citizens, see Rev. Stat., § 2168.

III. *ABANDONMENT OF CITIZENSHIP.*

(1) CITIZENSHIP MAY BE SO FORFEITED.

§ 176.

As to loss of Government protection by this means, see *infra*, § 190.

"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."

Mr. Jefferson, Sec. of State, to Mr. G. Morris, Aug. 16, 1793. MSS. Inst., Ministers. 4 Jeff. Works, 37.

The presumption of abandonment of nationality by long residence abroad is rebutted by a proof that such residence was that of a missionary who never intended to relinquish his nationality or his purpose finally to return home.

Mr. Everett, Sec. of State, to Mr. Marsh, Feb. 5, 1853. MSS. Inst., Turkey.

Domicil without naturalization in a foreign country may preclude the person so domiciled from claiming against such country the diplomatic intervention of his original sovereign.

Mr. Fish, Sec. of State, to Mr. Brauno, Dec. 7, 1870. MSS. Dom. Let. *Infra*, §§ 190, 198.

In determining the question of the domicil of a citizen of the United States in a foreign country, the question whether such citizen had complied with the internal-revenue laws of the United States as to income tax was held in 1870 to be a material circumstance to be considered.

Mr. Fish, Sec. of State, to Mr. Brauno, Dec. 7, 1870. MSS. Dom. Let.; *infra*, § 190. Mr. Fish to Mr. Overmann, Jan. 13, 1871. See also Mr. Fish to Mr. Wilson, Dec. 5, 1870; Mr. Fish to Mr. Hepburn, Dec. 20, 1870; Mr. Fish to Mr. Allen, Jan. 18, 1871; *ibid.*

"An eminent predecessor of mine in this Department, in an instruction to a minister of the United States in a foreign country, expressed the opinion that 'It can admit of no doubt that the naturalization laws of the United States contemplate the residence in the country of naturalized citizens, unless they shall go abroad in the public service or for temporary purposes.' In addition, the tests prescribed in a recent instruction to another minister of the United States abroad may be applied. These are, in substance, when and in what assessment district the returns required by the internal revenue laws of the United States have been made by the naturalized citizen; where and to whom have the taxes been paid? The instruction referred to also says that 'the omission to have made the returns or to have paid any tax would necessarily cast grave suspicions upon the claim of the party applying for the protection of a Government from whose support he has withheld the contributions required of all the citizens, whether resident at home or abroad, and if such omission has been long continued it will as a general rule justify the refusal of a recognition of the claim to protection."

Mr. Fish, Sec. of State, to Mr. Wing, Dec. 15, 1870. MSS. Inst., Ecuador.

A residence for a long series of years in a foreign land, coupled with a non-payment of taxes to the sovereign of birth or naturalization, may, without formal change of allegiance, forfeit a claim to protection from such sovereign.

Mr. Fish, Sec. of State, to Mr. Hepburn, Dec. 20, 1870. MSS. Dom. Let. Mr. Fish to Mr. Norton, Dec. 20, 1870; *ibid.*

"In respect to naturalized citizens of the United States, resident in Ecuador, but not natives of that country, who left this country under circumstances indicating that they obtained naturalization, not with a view to permanent residence here, but for the purpose of claiming the protection of this Government in foreign countries, the reasoning and the instructions contained in the circular of October 14, 1869, are applicable in a general sense. They have not, however, quite the same force and emphasis as in the case of naturalized citizens returning to

the country of their native allegiance. There is not the same presumption that when they go to their native land it is with the intention of establishing an abiding domicil. Moreover, the Government under whose jurisdiction they dwell cannot claim, as in the other case, that they revert to their native allegiance, but can only claim that local and temporary allegiance which every one owes to the Government whose protection he enjoys."

Mr. Fish, Sec. of State, to Mr. Wing, Apr. 6, 1871. MSS. Inst., Ecuador.
As to protection granted in such cases, see *infra*, § 190. As to domicil, see *infra*, § 198.

A citizen of the United States who, for thirty-eight years has resided in a foreign country and has during that period in no way contributed to the support or maintenance of his own Government, cannot claim its diplomatic intervention in his behalf.

Mr. Fish, Sec. of State, to Mr. Niles, Oct. 30, 1871. MSS. Dom. Let.

The purchase and continuous occupancy of a landed estate in a foreign country forms strong proof of an abandonment of home allegiance.

Mr. Fish, Sec. of State, to Mr. Hackett, June 12, 1873. MSS. Dom. Let.

"In your No. 784 you invite instructions from the Department respecting two cases, stated by you in the following language:

"'I. Madam Pepin applies, in behalf of her son, a young man eighteen years of age, to have some paper from the legation, stating that he is an American citizen, and is to be protected as such. His case is as follows: John Pepin, the husband and father, was a Frenchman by birth. When a young man he emigrated to the United States, was educated in Kentucky, and became a naturalized citizen, residing in New Orleans. In 1850 he returned to France, leaving some property in New Orleans, which is still held by his family, he having died several years ago. After his return to this country he married a French woman, by whom he had a daughter, now twenty years of age, and the son above spoken of. He never returned to the United States to live, but made France his residence up to the time of his death. The boy in question has never been to the United States, though the mother and daughter went there two years ago, and the mother obtained a passport from the State Department as an American citizen. She says that the boy got a passport two years ago from the United States minister in London, but that he has lost it.

"'II. A man and his wife, Americans by birth, came to Paris forty years ago, and have lived here ever since. This has become their permanent home, and they have never had any intention of returning to the United States. Several of their childen have been born here, and have never been to the United States, and never expect to go, and never want to go.'

"You also state that—

"'Many questions must arise in regard to persons claiming to be citizens of the United States. As every Frenchman is now held to military service, applications are being made to the legation by young men who have been treated and considered as Frenchmen to declare themselves Americans.'

"This seems to make it advisable not only to dispose of the particular cases set forth in your dispatch, but also to invite your attention to certain general considerations which may be useful in determining future cases.

"The fourteenth amendment to the Constitution declares that—

"'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'

"Every person, therefore, who, in the first place, is entitled to claim the right of citizenship by reason of birth within the jurisdiction of the United States, or by reason of naturalization therein, whether, under the laws of the General Government or by the operation of treaties for the annexation of territory, and who, in the second place, adds to that natural or acquired title the fact of a personal subjection to their jurisdiction, is constitutionally entitled to be recognized as a citizen, with all the consequences which may flow from such recognition. But the two concurrent circumstances must exist in every case, in order to make the constitutional right complete.

"It is, however, by no means to be assumed that Congress and the several legislatures which assented to the fourteenth amendment, contemplated that a temporary withdrawal of the person of the citizen from subjection to national jurisdiction should forfeit the rights of citizenship. Such a construction would do violence to common sense, to the customs of Americans, who, from the foundation of this Government, have been in the habit of residing in foreign countries and engaging in commerce there, retaining their nationality; and to the general jurisprudence of nations which recognizes such a residence as consistent with the preservation of nationality. * * *

"Congress did not then [in the statute of 1868] define (nor has it since defined) what may constitute expatriation. The Department is, therefore, in its general instructions, forced to look elsewhere for an enumeration of the acts, which may certainly be regarded as expatriating a citizen of the United States, so far as to disqualify him from appealing to the authorities of the United States for protection.

"Mr. Justice Marshall, speaking for the Supreme Court, has said in the extract above quoted, that when a citizen 'has made himself a subject of a foreign power his situation is completely changed.' This judicially-pronounced opinion of one of the most illustrious of my predecessors has been and is a recognized rule for the guidance of this Department.

"This proposition is too plain to need further discussion. There are cases, however, resembling those referred to in your dispatch, in which doubts may possibly arise, cases in which the voluntary expatriation is to be inferred, not from an open act of renunciation, but from other circumstances, as, for instance, a residence in a foreign land so constant, and under such circumstances, that a purpose of a change of allegiance may be reasonably assumed.

"In regard to such cases, I have to say that the right to be acknowledged as a citizen of the United States must be held as a high privilege and a precious right. When the person who possesses it is untainted by crime, or by the suspicion of expatriation, or by the non-fulfillment of the duties which accompany it, it entitles him abroad to the recognition and protection of a power which is not the least among the powers of the earth; while at home, under general regulations of law, he may participate in the distribution of political rights and privileges, he may enjoy the national guarantees of liberty and of protection to personal property, and he may share the advantages of education and the healthful social and moral influences which result from democratic institutions.

"It is provided by the act of 1855 (10 Stat. L., p. 604) that persons born out of the limits and jurisdiction of the United States, whose fathers at the time of their birth are citizens of the United States, shall be deemed and considered to be citizens of the United States, provided that the right of citizenship shall not descend to persons whose fathers never resided in the United States.

"I will presently refer to this proviso.

"Within the sovereignty and jurisdiction of the United States the persons contemplated by the act are entitled to all the privileges of citizenship; but while the United States may by law fix or declare the conditions constituting citizenship within its own territorial jurisdiction, and may confer the rights of American citizenship everywhere upon persons who are not rightfully subject to the authority of any foreign country or Government, it may be safely assumed that Congress did not contemplate the conferring of the full rights of citizenship upon the subject of a foreign nation who had not come within our territory, so as to interfere with the just rights of such nation to the government and control of its own subjects.

"It is a well-established principle of public law that the municipal laws of a state have no effect within the limits of another power, beyond such as the letter may think proper to concede to them.

"No foreign state can, by its municipal legislation, release from his obligation to the United States a person born within its territory and its jurisdiction who has continued from his birth to reside therein; and while he resides therein, and if, by the laws of the country of their birth, children of American citizens born in such country are subjects of its Government, the legislation of the United States should not be construed so as to interfere with the allegiance which they owe to the

country of their birth while they continue within its territory, or until they shall have relieved themselves of that allegiance and have assumed their rights of American citizenship, in conformity with the laws and Constitution of the country, and have brought themselves personally within its jurisdiction.

"I have above referred to the proviso to the act of 1855. It is evident from this that the law-making power not only had in view the limit (above referred to) to the efficiency of municipal law in foreign jurisdiction, but intended that a distinction be observed between the right of citizenship, declared by the act of 1855, and the full citizenship of persons born within the territory and jurisdiction of the United States, for those declared to be citizens by the act could not transmit citizenship to their children without having become residents within the United States; the heritable blood of citizenship was thus associated unmistakeably with residence within the country, which was thus recognized as essential to full citizenship.

"The provisions of the fourteenth amendment to the Constitution have been considered. This amendment is not only of more recent date, but is a higher authority than the act of Congress referred to, and if there be any conflict between them, or any difference, the Constitution must control, and that makes the subjection of the person of the individual to the jurisdiction of the Government a requisite of citizenship.

"It does not necessarily follow from this that the children of American parents born abroad may not have the rights of inheritance, and of succession to estates, although they may not reside within or ever come within the jurisdiction of the United States. That question is not within the present consideration.

"But if the citizen, on the one side, has rights which he may claim at the hands of the Government, on the other side there are imperative duties which he should perform toward that Government. If, on the one hand, the Government assumes the duty of protecting his rights and his privileges, on the other hand the citizen is supposed to be ever ready to place his fortune and even his life at its service, should the public necessities demand such a sacrifice. If, instead of doing this, he permanently withdraws his person from the national jurisdiction, if he places his property where it cannot be made to contribute to the national necessities; if his children are born and reared upon a foreign soil, with no purpose of returning to submit to the jurisdiction of the United States, then, in accordance with the principles laid down by Chief-Justice Marshall, and recognized in the fourteenth amendment, and in the act of 1868, he has so far expatriated himself as to relieve this Government from the obligation of interference for his protection.

"The Executive Department of the Government has had occasion to consider this question in negotiating and concluding treaties on the subject of naturalization. Thus it has been agreed with Bavaria, with

Hesse, with Mexico, with North Germany, and with Würtemberg, that the residence of a naturalized citizen in the land of his nativity, without intent to return to the United States, shall work of itself a renunciation of his naturalization, and that such an intent may be held to exist where the residence is continuous for more than two years.

"This Department would not assume to decide that in such cases as are referred to in your dispatch a continuous residence in a foreign country of two or even of many years should of itself work an expatriation. Expatriation is a fact to be established, like any other fact, by external evidence, and such continuous residence, even for a lifetime, is capable of being explained on other theories than that of a voluntary denationalization. But when the fact is once established, by whatever proof, it would, in the opinion of this Department, operate to place the expatriated person outside the number of those who can claim the protection of this Government as a right.

"The duty of protection as toward the citizen, or the right of its exercise as toward the foreign power, is not always correlative with the fact of citizenship. Thus it was demonstrated by my predecessor, Mr. Marcy, that an extreme case may arise in which a Government will be justified in taking upon itself the protection of persons who are not citizens. On the other hand, it is apparent that there may be instances of claims to citizenship which is nominal only, if it have any existence, as where the duties of citizenship have never been performed, where the person of the individual has never been within the national jurisdiction, or is voluntarily removed from it, and purposely kept beyond it; where his movable wealth is purposely placed where it may never contribute to the national necessities, and his income is expended for the benefit of a foreign Government, and his accumulations go to swell its taxable wealth; and where from the surrounding circumstances it must be assumed that he has abandoned the United States and never intends to return to it.

"It cannot be contended that a person with so faint an exercise of the duties of citizenship is entitled to claim the protection of this Government as a right.

"Each case as it arises must be decided on its merits. In each the main fact to be determined will be this, has there been such a practical expatriation as removes the individual from the jurisdiction of the United States?

"If there has not been the applicant will be entitled to protection.

"Continuous absence from this country does not necessarily presume expatriation. It has always been held to be consistent with a purpose of returning; and in the case of a natural-born citizen, or of a naturalized citizen, so residing in any country, except the country of his nativity, this Department would require its agents to extend the protection of the Government to all citizens, except in the presence of strong

affirmative proof of a purpose of expatriation. But when a naturalized citizen returns to his native land to reside, the action of the treaty-making power above referred to would seem to require that such agents be jealous and scrutinizing when he seeks their intervention. Even in such case the purpose of not renouncing the adopted citizenship might be manifested and proved in various ways, such as the payment of an income tax when such a tax was imposed, the maintenance of a domicile, and the payment of taxes on personal property within the United States, or other affirmative action.

"It is the duty of the diplomatic and consular agents of the United States to listen to all facts which may be produced tending to exclude the presumption of expatriation, and to give to them the weight to which in each case they may be entitled.

"The particular cases referred to in your dispatch are easily determined on the facts as you state them.

"Pepin, the son of a naturalized Frenchman who returned to France and died there, was never in this country. It is alleged that he obtained an American passport from the legation in London some two years since; but it is not produced, and thus leaves him without any one of the *indicia* necessary to show an intent on his part to assume the duties of citizenship as well as the privileges granted by the act of 1855.

"Excepting the alleged application for the passport in London, it would seem quite possible that, were it not for his desire to avoid the performance of duties required by French law, he would perhaps never have dreamed of calling himself an American, that he would remain in France and avoid all duties to the United States, that he would call himself a citizen of the United States and avoid all duties to France.

"In the other case, an American whose name is withheld, has lived with his family forty years in France, has reared his children there, has never proposed to return to the United States, and his children have never been to the United States, and never expect to go, and never want to go.

"In each of these cases there is a presumption of a purpose of expatriation so strong that, until it can be rebutted to your satisfaction, you will justified in concluding that the persons respectively are not entitled to your intervention to protect them against the operation of the laws of the country which they have selected as their place of residence."

Mr. Fish, Sec. of State, to Mr. Washburne, June 28, 1873. MSS. Inst., France; For. Rel., 1873. See this case referred to by Mr. Frelinghuysen to Mr. Lowell, Feb. 27, 1884, *supra*, § 171.

"I am of opinion that the entrance into the civil service of the country of his nativity by a naturalized citizen of the United States, who has returned to that country, and continues his residence there beyond the

length of time at which, by convention between the two states, the intent not to return to the country of adoption may be held to exist, must be taken to be very strong 'evidence of the absence of intent to return,' and must raise a presumption, which might, and probably would, make it very difficult for the country of adoption to assert the continued citizenship of the party thus taking service and continuing to reside in the country of his nativity."

Mr. Fish, Sec. of State, to Mr. Müller, Jan. 28, 1874. MSS. Dom. Let.

A law by a foreign state providing that all persons visiting such state are to be regarded as citizens or subjects, will not be regarded as internationally binding.

Mr. Fish, Sec. of State, to Mr. Russell, Feb. 22, 1875. MSS. Inst., Venez. Sec, to same effect, 9 Op., 356; Black, 1859; *supra*, § 172.

A naturalized citizen of the United States cannot be regarded as renouncing his United States citizenship merely because he returns to his native land. To sustain such renunciation, there must be either an express declaration of renunciation, or acts from which it may be logically inferred.

Mr. Frelinghuysen, Sec. of State, to Mr. Osborne, June 19, 1882. MSS. Inst., Arg. Rep. Same to same, July 18, 1883; *ibid.*

Abandonment of naturalization in the United States may be inferred from a protracted stay in the country of origin after returning there, coupled with proof of *animus manendi*, and of entering on political duties in the latter country.

Mr. Frelinghuysen, Sec. of State, to Mr. Taft, Jan. 18, 1883. MSS. Inst., Austria.

Naturalization may be lost by resumption of native domicil.

Mr. Frelinghuysen, Sec. of State, to Mr. Fish, Apr. 23, 1883. MSS. Inst., Belgium.

"By the French code all Frenchmen who become citizens of another country by the laws thereof, thereby lose their French citizenship. This Department, however, cannot give Mr. Vawdoit any assurance in advance against arrests or other annoyances to which he might possibly be subjected in France in case of his return to that country, nor can it advise him as to the expediency or propriety of such return. This must be left to his own judgment. Should he, however, conclude to return to France, and while there be arrested or held on account of previous military occupations, this Government would extend to him all the protection which as an American citizen he may be found under the circumstances entitled to."

Mr. Frelinghuysen, Sec. of State, to Mr. Brents, Jan. 24, 1884. MSS. Dom. Let. See *supra*, § 172; *infra*, §§ 190, 215.

Voluntary expatriation by a naturalized citizen which forfeits a right to diplomatic intervention may be inferred from a long residence abroad

in the place of his birth, by non-payment of taxes and non-possession of property in this country, and by failure to express any intention to return.

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, Feb. 27, 1884. MSS. Inst., Gr. Brit.

"When a citizen of the United States voluntarily places himself within the jurisdiction of a foreign Government, and subjects himself and his property to its laws, and when such citizen afterwards seeks the interference of the United States to redress some wrong which he may have suffered at the hands of such foreign Government, this Government reserves to itself the right of determining not only on the merits of the particular claim, but also on the claimant's right to its protection. It is for this Government to say whether the claim shall be presented or not to the foreign Government."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, Feb. 27, 1884. MSS. Inst., Gr. Brit.; For. Rel., 1884.

For fuller extracts from opinion in this case, see *supra*, § 171.

"Mr. Bagur resided in the United States from 1852 to 1865, and in 1860 appears to have been naturalized here; but, in view of what follows, no opinion is necessary as to the regularity of this procedure. In 1865 he returned to Spain. Thither he carried his wife, recently married. There his children were born, and there he has since remained—over twenty years. The fact that he has never voted or held office in Spain or taken part in any political demonstration there, may show that he was not a zealous Spaniard, but does not prove him to have been a loyal citizen of the United States.

"While there is no allegation that he intended to return to the United States, the inference to the contrary is rendered very strong by his settlement in Spain as the place of his children's birth and education, and by his failure even now to make any effort to return. Moreover, there is no evidence that he ever contributed by payment of taxes or otherwise to the support of this Government. The facts furnish a presumption not rebutted that he has abandoned his nationality, involving his minor children in the same abandonment. Under these circumstances, thus understood, the legation will not accede to the request of Mr. Bagur for a United States passport."

Mr. Porter, Acting Sec. of State, to Mr. Curry, Jan. 4, 1886. MSS. Inst., Spain.

The presumption of abandonment of acquired allegiance in the United States by a native Turk returning to Turkey and there remaining two years is open to rebuttal by proof of an intention to return to the United States.

Mr. Bayard, Sec. of State, to Mr. Cox, Mar. 4, 1886. MSS. Inst., Turkey; see *supra*, §§ 172 *ff.*

"Were we to hold that citizens of the United States cannot, without forfeiting their nationality, reside from time to time in South American

States as agents of their countrymen, the business of both continents would receive a heavy blow. In affairs so vast, so intricate, and so continuous as those of Alsop & Co, for instance, there can be neither consistency nor responsibility of action except through trusted agents, who, while taking up continuous abode in their places of business action in South America, would from early personal relations be in the confidence of their chiefs, making their central business in this country the place to which their domiciliary duties would relate, and continuing to subject themselves to the laws of the country in which the firm is domiciled. As a matter of public policy, therefore, as well as of international law, I cannot but conclude that Mr. Wheelwright's domicile and nationality are in the United States."

Mr. Bayard, Sec. of State, to Mr. Roberts, Mar. 20, 1886. MSS. Inst., Chili.

"It appears from your dispatch that Mr. Cranz was born at Hamburg, Germany, about the 19th day of April, 1860; that he emigrated to America on the 18th day of September, 1877; that he was naturalized at Boston in 1882; that he left the United States the last time on the 22d day of December, 1883; that he is now residing temporarily at Brussels; that his father resides in Austria, of which county he, the father, is a subject, and that he and his father are engaged in trade in Europe. You state, moreover, that in the application signed and sworn to by Mr. Cranz for a passport he declares that he '*has no intention to return to the United States to reside*, though it is possible he may some time make a visit there, and that he desires the passport for the purpose of residing in Europe.'

"Section 4075 of the Revised Statutes provides that the Secretary of State *may* grant and issue passports, and *may* cause them to be issued by such diplomatic and consular officers as the President shall designate.

"Under the statute it is always a matter of discretion in each individual case as to whether or not a passport shall be issued. As it appears that Mr. Cranz resided in the United States barely long enough to be naturalized, and as it appears that he has no intention to return to this country to reside, or to take upon himself here the duties and obligations of American citizenship, the Department fully approves of your course in declining to issue him a passport."

Mr. Bayard, Sec. of State, to Mr. Tree, Apr. 9, 1886. MSS. Inst., Belgium. See *infra*, §§ 190, 215.

"Your dispatch No. 193, of the 1st instant, in reference to the application of Albert Landau for a passport, has been received.

"In the attached memorial Mr. Landau alleges that he was duly naturalized in Philadelphia during the year 1854, and that subsequently in the same year, having obtained a passport from this Department, he returned to Europe. During the following year, it is alleged, he lost both his record of naturalization and his passport, but obtained another

passport from the legation at Constantinople. This was subsequently canceled, when a new passport was given him by the consul-general at Alexandria, Egypt, in 1863. The latter passport he is unable to produce. He has not, apparently visited the United States since 1854. He now desires a new passport to be issued to him by your legation.

"It is not necessary to consider whether naturalization can be proved by parol, in case of destruction of the record, for in this case there is no adequate proof that the record of naturalization ever existed. But even supposing that Mr. Landau's naturalization were duly proved, I hold that he is not now entitled to a passport. He was naturalized, so he claims, in 1854, at Philadelphia. He was in Levant in 1857, and there amassed a fortune, with which, about 1868, he retired to Vienna. During the whole of this period, according to his own statement, he was absent from the United States. This absence, therefore, commencing almost at the instant of his naturalization, continued over thirty-four years, during which time he performed none of the duties, nor made any of the contributions, of a citizen to the support or welfare of the country of his adoption, although during a portion of that time all the resources of that country were severely drawn upon. Had he paid an income tax, as by law he should have done, if he retained his citizenship during the period when that tax was imposed, it would be easy for him to establish such payment. No attempt has been made to do so, and we must therefore presume that no such tax was paid. Had he paid taxes to the State of Pennsylvania, in which, it is to be inferred from his statements, he claims to have been domiciled, this, also, could be easily proved; and that no such proof is offered justifies the presumption that none of such taxes were paid. He keeps, exempt from all taxation in this country, the wealth he has accumulated under the protection of a passport and alleged citizenship of this Government; and he thus stands aloof, demanding the protection of allegiance while abandoning all its duties, and from across the ocean, in a foreign land, applies to this Government for a passport which, without his performing any of the duties of a citizen of the United States, would relieve him, so far as the interposition of the United States could do so, from the duties of a subject of Austria. This is not a case in which the United States can or ought to interpose. If Mr. Landau had ever any title to be considered a citizen of the United States, he has abandoned it. Citizenship of the United States, it is my duty to say, is a high privilege, and, when granted to an alien, confers great prerogatives, whose maintenance, when they are honestly procured and faithfully exercised, the United States will exert its fullest powers to vindicate. These prerogatives are granted to protect not merely men of wealth, such as the present memorialist, but the humblest and most friendless immigrant who seeks shelter and a home on these shores. But the enjoyment of the prerogatives is conditioned on the performance of the correlative duties of loyal service, of love to the country of adoption, of

support of the country when she needs support, and the payment of th just taxes that country imposes upon all its citizens. When the per formance of that duty ceases, then cease the prerogatives of the citizen ship on which they are conditioned. As far as I can judge from what i before me in the present case, these duties of citizenship have been stead ily evaded by non-residence, and have never been performed by the me morialist. Whatever may have once been his title to citizenship, it wa long since abandoned by him. His application for a passport shoul therefore be refused."

Mr. Bayard, Sec. of State, to Mr. Lee, July 24, 1886. MSS. Inst., Austria. Se *infra*, § 190.

As to forfeiture of citizenship by desertion of the military or naval service o the United States, by avoiding draft, &c., see Rev. Stat., §§ 1996–1998. Fo other cases, see App., vol. iii, § 176.

Domicil in a country of voluntary asylum may suspend allegiance t the country of birth.

Caignet *v.* Pettit, 2 Dall., 234; S. C., 1 Yeates, 516.

To effect expatriation there must be not only a renunciation of citi zenship of the United States, but actual removal for some lawful pur pose, and the acquisition of a domicil elsewhere.

Talbot *v.* Janson, 3 Dall., 133.

Merely entering into the military or naval service of a foreign sov ereign does not by itself work expatriation.

Santissima Trinidad, 1 Brock, 478 *ff.*; 7 Wheat., 283. See *infra*, § 392.

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

Börs *v.* Preston, 111 U. S., 252.

There is no *mode* of renunciation by a citizen of his citizenship pre scribed. But if he emigrates, carries his family and effects along with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign Government, this would imply a dissolution of his previous relations with the United States.

9 Op., 62, Black, 1857.

A naturalized Bavarian may return, so far as the laws of the United States are concerned, to his former allegiance; and the Bavarian Gov ernment may prescribe the manner of his doing so.

Ibid.

Naturalization is the highest, but not the only, evidence of expatria tion. Such acts, in addition to the selection and enjoyment of a foreign domicile, as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of a citizen of the country of domicile, such as accepting public employment, engaging in

military services, &c., may be treated by this Government as effecting expatriation.

14 Op., 295, Williams, 1873.

Intent to remain in a foreign country may be evidenced in various ways and by a great variety of circumstances, and it is impossible to lay down any general rule by which all cases can be decided. Intent is the great criterion by which the character of domicil is determined.

Ibid.

As to an alien's losing rights in an enemy's country, see *infra*, § 352.

As to return of naturalized citizen to his native land, see Lawrence, com. droit int., ii, 249.

As to forfeiture, by abandonment of country, of right to call for protection, see *infra*, §§ 190, 215.

(2) OR BY NATURALIZATION IN ANOTHER COUNTRY.

§ 177.

A citizen of the United States who becomes naturalized in another country loses his United States citizenship, and can only regain it by being duly naturalized as a citizen of the United States.

Mr. Fish, Sec. of State, to Mr. Carpenter, Feb. 5, 1873. MSS. Dom. Let. Mr. Fish, Sec. of State, to Mr. Whiting, Feb. 6, 1873; *ibid.*

"Your dispatch of the 5th ultimo relative to the case of Mr. Peter Cushman Jones, an American citizen resident in Honolulu, has been received.

"Mr. Jones, as it appears from his letter to you of the 26th of May, a copy of which you inclose, was born in Boston, Mass., in 1837, and in 1857 took up his residence in the Hawaiian Kingdom, entering into mercantile pursuits there as a domiciled American citizen. Becoming the owner of a merchant vessel there under the Hawaiian flag, it became necessary for him, in order to the maintenance of his rights in that Kingdom, to take an oath of allegiance to the sovereign of the islands. The form of the oath is set out in Mr. Jones's letter thus:

"'The undersigned, a native of the United States of America, being duly sworn, upon his oath declares that he will support the constitution and laws of the Hawaiian Islands, and bear true allegiance to His Majesty Kamehameha IV.'

"Your inquiry is as to what effect this proceeding may have upon the status of Mr. Jones's American citizenship.

"In becoming a citizen of the United States the law requires that an alien shall not only swear to support the Constitution and laws of this country, but also to renounce all other allegiance, and especially that of the country of which he may be then a subject or citizen. In the oath taken by Mr. Jones there is no such express renunciation of his American citizenship, nor do the circumstances manifest any intention on his part to expatriate himself.

"It may, however, at some future time, become a question for judicial investigation in his case.

"The doctrine of the executive branch of the Government on this subject is thus expressed by the Attorney-General:

"'To constitute expatriation there must be an actual removal, followed by foreign residence, accompanied by authentic renunciation of pre-existing citizenship' (8 Op., 139), and this view finds support in some judicial decisions (Juando *v.* Taylor, 2 Paine, 652).

"In the absence of a direct judicial determination of the question, I do not feel disposed to deny to Mr. Jones any right or privilege pertaining to his character of American citizenship, and therefore, while the Department will not undertake to express an authoritative opinion on the effect which his course in Hawaii may ultimately have on his *status* in that regard, you are authorized to extend to him such protection as may be properly due to a citizen of the United States residing in and having acquired a commercial domicile in a foreign state. This protection must, of course, be limited and qualified by the liabilities and obligations incident to such commercial domicile."

Mr. Frelinghuysen, Sec. of State, to Mr. Comly, July 1, 1882. MSS. Inst., Hawaii; For. Rel., 1882.

Citizens of the United States cannot divest themselves of allegiance to the Government by residence among Indian tribes, nor even by becoming members thereof.

2 Op., 693, Butler, 1834.

A native-born citizen of the United States, who has been naturalized in a foreign country, and has thus become a citizen thereof, is to be regarded as an alien; and, in order to reacquire his original nationality, he must conform to the laws of the United States providing for the admission of aliens to citizenship.

14 Op., 295, Williams, 1873.

A native of the United States, naturalized as a citizen of Mexico, did not forfeit his right, under a grant from Mexico, to lands in California, by afterwards joining the forces of the United States in the war by which that territory was acquired.

U. S. *v.* Reading, 18 How., 1.

(3) Effect of treaty limitations.

§ 178.

Qualifications imposed by treaty become, when such treaty is duly solemnized and ratified, part of our naturalization system.

Supra, § 138.

"It is much to be desired that there should be a revision of the treaties affecting the status of naturalized Germans (other than Austrians) in

the United States. They were all negotiated by you, and you are therefore doubtless familiar with their practical defects.

"When they were negotiated several independent nations existed in the territory which now constitutes the German Empire. When the Empire was formed we had entered into treaties for the regulation of naturalization with the North German Union, with the Grand Duchy of Baden, with the Kingdom of Bavaria, with the Grand Duchy of Hesse as to the citizens of the parts of the Grand Duchy not included in the North German Confederation, and with the Kingdom of Würtemberg.

"The first defect in the existing treaties is that they are not coextensive with the limits of the Empire. The provisions of none of the existing treaties extend to Alsace and Lorraine, which form an integral part of the Empire, and from which there has long been a large and valuable emigration to the United States, whose status deserves recognition and protection.

"The next defect in the existing treaties is that they make different and, in some respects, conflicting provisions respecting the naturalized citizens. I will point out these inconsistencies.

"For the sake of convenience and brevity I confine myself to provisions respecting the acquisition of American citizenship by Germans, it being understood that the provisions of the treaties are mutual unless otherwise stated.

"1. Citizens of the North German Confederation *who become* naturalized citizens of the United States, and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation American citizens, and shall be treated as such; but citizens of Baden, or of Würtemberg, or of Bavaria, or of Hesse, who *have* become or *shall* become such naturalized citizens, and have so resided, are to be held to be such citizens (neither German country, however, undertaking to hold them to be such citizens beyond its own borders). A protocol, signed at the same time with the Bavarian treaty, makes a still wider divergence in the case of that treaty. With this power we have agreed that the words 'resided uninterruptedly' do not mean 'a continued bodily presence,' and therefore 'a transient absence by no means interrupts the period of five years; and also that under certain circumstances a five years' residence shall no longer be required.'

"Thus on this most vital point of a naturalization treaty we find:

"(*a*) That there are two provinces unaffected by any treaty.

"(*b*) That the remaining states are affected by four treaties, each operative only within its own territorial sphere.

"(*c*) That of these four treaties, three expressly relate to past acts of naturalization as well as to future ones, while the fourth and most important one is entirely silent as to past acts.

"(*d*) And as to one treaty, we are bound to a construction of the word 'uninterruptedly,' which we have not a right to insist upon as to the other three treaties.

"2. Crimes committed before emigration may be punished, in what was North Germany, on the return of the emigrant, saving always the limitation established by the laws of his original country. The other treaties add to this saving clause the words 'or any other remission of liability to punishment.' Bavaria adds to this that the returned emigrant is not to be made punishable for the act of emigration itself, and Baden makes special provisions concerning trial and punishment for non-fulfillment of military duty.

"3. If a German naturalized in America renews his residence in North Germany without intent to return to America, he shall be held to have renounced his naturalization in the United States. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country. The same provision applies to Würtemberg as to a 'Würtemberger,' to Hesse Darmstadt as to a 'Hessian naturalized in America but originally a citizen of the part of the Grand Duchy not included in the North German Confederation;' to Bavaria as to a 'Bavarian,' but as to the latter power it is declared that the article 'shall only have this meaning, that the adopted country of the emigrant cannot prevent him from acquiring once more his former citizenship'; but not that the state to which the emigrant originally belonged is bound to restore him at once to his original relation. As to Baden, it is only provided that the emigrant from the one state who is to be held as a citizen of the other state, shall not on his return to his original country be constrained to resume his former citizenship; yet, if he shall, of his own accord, reacquire it and renounce the citizenship obtained by naturalization, such a renunciation is allowed, and no fixed period of residence shall be required for the recognition of his recovery of citizenship in his original country.

"Here, again, we find great defects, which it is very desirable to have remedied.

"(*a*) The provisions respecting residence in the old country and the reacquisition of citizenship are unequal, and in the case of Bavaria uncertain.

"(*b*) Residence in other parts of Germany than that covered by the provisions of the particular treaty is inoperative to work a loss of the acquired citizenship, which is against the interests and the real intention of the United States and of Germany.

"4. Each of these treaties contains a provision respecting existing extradition treaties. The treaties thus referred to appear to be identical in principle, except that the treaty with Baden contains no provision respecting the utterance of forged paper, while such a provision is found in all the other treaties. The extradition treaties with France, concluded in 1843 and 1845, which may be contended to be in force as to the portions of Alsace and Lorraine which were ceded to Germany, contain a different enumeration of crimes, and include rape and burg-

lary as among the offenses for which an extradition may be claimed by one Government of the other.

"5. None of the treaties make a provision protecting the rights of inheritance of the emigrant, in cases like Klatt's, where the citizenship of one country is lost and that of the other is not yet acquired.

"I have already expressed the opinion, in my No. 560, that it is desirable to revise these several treaties, and to reduce the respective rights and obligations under them to the simplicity and definiteness of a single, or rather of two, instruments.

"The extension of the provisions of the naturalization treaty with North Germany would, in the opinion of the President, be the simplest and best way to solve that question, adding to it such a provision as might be necessary, under German laws, to enable Germans who have declared their intention to become citizens of the United States, but have not yet become such, to inherit real and personal estate in Germany, and also agreeing that its provisions are to extend to all past naturalization."

Mr. Fish, Sec. of State, to Mr. Bancroft, Apr. 14, 1873. MSS. Inst., Germ; For. Rel., 1873. See *supra*, §§ 172 *ff*.

"It is much to be regretted that the present Government at Berlin is not disposed to listen favorably to the suggestion which you were authorized to make that the naturalization treaty with the North German Union should be extended over the Empire.

"The circumstances under which the existing treaties were negotiated necessarily made them what they are. To have gained at that time the recognition of the principle of the right of emigration was a triumph of which every one connected with it has good right to be proud. But the fact that the negotiations were made with different and independent Governments, each with its own peculiar views, has been the cause of the divergencies referred to in my No. 569. Notwithstanding what you say in your No. 480, I still think it would be better to remove these differences, and to have but one rule for all Germany. And I had thought that, as your name is identified with the recognition of the great principle upon which the treaties were founded, it was due to you that the complete structure which must inevitably come should bear your signature. I regret to learn from you that there is no present probability of such a result.

"A German can now come to America, obtain his naturalization papers through the operation of our laws, return to Germany and reside there indefinitely as an American citizen, provided he does not reside the requisite time for renunciation in the territories under the jurisdiction of the particular power of whom he was formerly a subject. It is true that such a course would be a fraud upon the United States and a fraud upon the German Empire. We should be deprived of the resources of the naturalized citizen towards the support of the state;

Germany would be deprived of the right to call upon him for her defense. It is for the interest of neither to perpetuate this. We are ready on our side to remedy it by extending the provisions of the treaty with North Germany over the Empire, as I have already said; but if our proposition will not be listened to, we must await the return of a better reason."

Mr. Fish, Sec. of State, to Mr. Bancroft, June 4, 1873. For. Rel., 1873. By Mr. Bayard in instructions to Mr. Pendleton of June 28, 1887, the application of the treaty to Alsace-Lorraine is affirmed.

A citizen of the North German Confederation, though he has become a naturalized citizen of the United States, must have resided uninterruptedly in the latter country for five years before his acquired citizenship will be recognized by the former, under the treaty of February 22, 1868.

13 Op., 376, Akerman, 1871.

The recital in the record of his naturalization that he had resided continuously in the United States for more than five years would not be conclusive as to the fact so recited.

Ibid. See other cases *supra*, § 173.

(4) UNDER TREATY WITH GERMANY, TWO YEARS' RESIDENCE IN GERMANY PRIMA FACIE PROOF OF ABANDONMENT.

§ 179.

"Your No. 189 is received. It incloses an announcement that hereafter naturalized Germans who have resided in Germany more than two years shall not be forced into the army immediately upon the expiration of that time, but shall first be offered an opportunity to return to the United States.

"The announcement is carefully worded and seems intended to remove the difficulty which has existed. If the course indicated be fairly pursued and naturalized citizens resident in Germany are notified of the intentions of the authorities and are allowed to depart prior to any attempt to force them into service, it will, as is hoped, remove an objectionable feature in the working of the treaty, and not compel you to discuss cases where an adverse decision has practically been already pronounced by the authorities."

Mr. Fish, Sec. of State, to Mr. Davis, Nov. 5, 1875. MSS. Inst., Germ. See *supra*, § 149.

"A naturalized citizen may forfeit his naturalization before the two years mentioned in the treaty have elapsed. To reach this conclusion, however, in such a case, would require clearer proof than is generally to be derived from silence or from want of a general statement of intention to return. However this may be, it would appear that any person applying for a passport may fairly be required to comply with

such proper regulations as have been adopted by the legation, and to make such preliminary statements as are demanded in all cases."

Same to same, Nov. 1, 1876; *ibid.* See, as to negotiation of this treaty, *supra*, § 149.

"While the intent to remain in the country of birth *may* be held to exist after two years' continuous residence, it is in reality not so held without special circumstances showing either an intent to remain permanently, or the absence of all intent to return to the United States."

Mr. Evarts, Sec. of State, to Mr. Williams, of House Committee on Foreign Relations. MSS. Report Book.

Two years' residence in such cases is merely *prima facie* proof of abandonment of nationality.

Mr. Fish to Mr. Davis, July 20, 1875. MSS. Inst., Germ. Same to same, Nov. 5, 1875; *ibid.* Same to same, June 26, 1876; *ibid.* Same to same, July 13, 1876; *ibid.* Mr. Evarts to Mr. White, June 6, 1879; *ibid.* Mr. Frelinghuysen to Mr. Kasson, Feb. 7, 1885; *ibid.*

"In the treaty between the United States and the North German Confederation the fourth article provides as follows:

"'If a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States. Reciprocally, if an American naturalized in North Germany renews his residence in the United States without the intent to return to North Germany he shall be held to have renounced his naturalization in North Germany. *The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country.*'

"An important question has been referred to me which involves the lines underscored in the above article. The question is this: Is the residing for more than two years by a person naturalized in his country of origin an irrebuttable proof of an intention not to return to the naturalizing country?

"As the same question arises under the treaties with Baden, Bavaria, Hesse-Darmstadt, and Würtemberg, I propose, in response to the inquiries put to me, to give it a detailed examination. In doing so I beg to state that I have given careful consideration to the excellent report from Mr. Deuster, of the Foreign Affairs Committee of the House of Representatives, submitted on the 17th of February, 1885.

"No legislation, however, took place in conformity with the recommendations of this report, and I am obliged to consider the question irrespective of any prescription of the law-making power. The question, I would also beg to say, is one that arises constantly in the municipal jurisdiction both of Germany and the United States. The position that I now propose to take has been accepted as authoritative in both countries. This position is, that a statutory permission to make a particular mode of proof of a contested fact admissible, does not exclude other modes of proof; and that when the statutory proof is produced it is, unless otherwise prescribed in the statutes, as much open to rebuttal as are other modes of proof. This position I now proceed to illustrate from our own jurisprudence, remarking that the same position is taken by German authorities on the law of evidence.

"(1) I notice, in the first place, statutes permitting depositions to be read in certain classes of cases in which, in common law, they would not be admissible. Those statutes usually run in the same words as those underscored in the article before us. They provide that such proof *may* be received. No one ever pretended that the enactment of such a statute makes the depositions so provided for the exclusive mode of proof of the litigated facts, nor that the facts they state are irrebuttable.

"(2) Another illustration may be found in the statutes providing that exemplification of deeds *may* be received in evidence. Here, again, no one would question that the original deed would be admissible, or that the existence or efficacy of such an exemplification could not be impeached on grounds of fraud or non-execution.

"(3) A third illustration may be found in the statutes which provide that the statutes of foreign states may be proved from the printed statute books. Here, again, it has always been conceded that such a statute does not exclude other proof of foreign statutes, and that the evidence which statutes are supposed to give may be rebutted.

"I now proceed to take up more particularly the question whether statutes providing that intent may be proved in a particular way prescribe such way as exclusive and irrebuttable. We have numerous statutes of this class in this country, and similar statutes or judicial rulings are to be found in German jurisprudence.

"I notice, in particular, so far as this country is concerned, the following illustrations:

"(1) Statutes which prescribe that having in possession counterfeit coin in quantities may be proof that such coin is held for illegal purposes. Now, we have numerous decisions from our courts to the effect, on the one side, that such proof is not exclusive proof of intent, and that on the other side, when offered, it is rebuttable.

"(2) Statutes have also been enacted in several States providing that carrying dangerous weapons about the person may be presumed to be for an illegal object. Now, in no case under such statutes would it be maintained that so carrying such weapons is the sole proof of intent, or that such proof, when admitted, cannot be rebutted.

"(3) We may also turn to the statutes prescribing that having illicit or contraband goods in possession shall be regarded as proof of an intention to dispose of such goods in violation of law. Very many statutes of this class have been passed in reference to the sale of intoxicating liquors, and similar statutes have been adopted as part of the revenue system of the United States. Here, again, it would not be pretended either that the possession of the illicit or contraband articles is the sole proof of the illegal intent, or that when such proof is offered it could not be rebutted.

"(4) The fourth illustration may be found in the recent statutes adopted in England and the United States, providing that parties may be witnesses in their own cases, coupling these statutes with the judicial interpretation assigned to them, that parties, when their intent is disputed, may prove what that intent was. No one in this country would have the audacity to maintain that such statutes preclude any other proof of intent than that which the parties themselves should give, and that the evidence of the parties when given should be irrebuttable.

"The North German code provides also for numerous cases in which parties may be admissible. Yet nothing is more remarkable in German jurisprudence than the elaborate energy with which, in cases of all

classes, extrinsic facts are appealed to for the purpose of giving a supplementary proof to the testimony of parties, or of controverting such testimony by contradictory proof.

"I therefore maintain that, even though the treaty had prescribed peremptorily that when a person naturalized in the one country resides more than two years in the other country, the intent not to return is to be held to exist, this would not exclude other proof of an intent not to return, nor would it be insusceptible of rebuttal by proof that he did intend to return. Our courts have frequently so held when construing statutes providing that intent or other litigated facts are to be proved in a particular way. But the treaty contains no such peremptory direction. It does not say that the intent not to return *shall* be held to exist, but it says the intent not to return *may* be held to exist.

"It is clear, therefore, that this method of proof of the *animus manendi* is not the only mode by which such *animus manendi* may be proved. It would be perfectly competent for a German by birth, who had been naturalized in the United States, to renounce his naturalized allegiance in one week after his return to Germany. It would be perfectly competent for the German Government in such cases, or in cases in which the returned subject had remained over two years in Germany, to offer other proof besides that of the remaining, to prove that he had intended to resume his allegiance of birth.

"And, on the other hand, it would be perfectly competent for such a citizen, either before or after the two years had elapsed, to say that it was his intention not to remain in Germany, but to return to the United States. The question, it will be observed, is closely related to that of domicil. No matter how long a resident in a particular country has remained there, his domicil is in the country of his origin, if he intends to return to it as his final home. No matter how short a time an emigrant may be in the country to which he emigrates, his domicil is established there if he intends permanently to remain.

"For the construction that is here given to the treaty two arguments drawn from the condition of things as presented to the negotiators may be here adduced.

"(1) It can hardly be supposed that Germany intended to repel from her soil the multitude of naturalized citizens of the United States, who, born in Germany, desire to return and reside there for periods exceeding two years.

"I will take as an illustration of this Germans naturalized in the United States who go to Germany for literary and business purposes. Many of these persons require a residence of over two years in Germany to effect their object, and it is most unlikely that the negotiators intended to exclude from Germany men such as these, whose presence in matters of literature might adorn, and in matters of business might benefit, the country of their temporary residence. It is well known that the selling agents of many great manufacturers and producers, both in Germany and the United States, are in the habit of remaining often over a period much greater than two years in the place of their agency, and it cannot be questioned that the continual presence of such agents, retaining as they do their allegiance to the country from which they are sent, is greatly conducive to the business prosperity of the country in which their agency is executed. Yet the clause before us would preclude inexorably a stay of such agents beyond the period of two years. And even a more striking instance of the improbability of the construction I here contest is to be found in the case of the children of German

parents naturalized in the United States, when such children go to Germany for education. Several thousand students from the United States are said at present to be in Germany. A large proportion of these are children of Germans naturalized in the United States. No thorough course of education in Germany could be obtained if the limit of study be two years. The benefits of such thorough course of study both to Germany and the United States cannot be disputed, and it is still less open to dispute that there are multitudes of German parents, who, though naturalized in and truly loyal to the United States, are attached to the literature of their native land and to its system of education and discipline, and who desire that their children should have the advantages of German educational institutions. It is hardly to be supposed that the negotiators of this treaty intended to put a stop to the enjoyment of such advantages by the children of naturalized Germans when they are open to the children of citizens of the United States by birth. It is not likely that the German negotiators of this treaty in particular would in this as well as in the other cases have discriminated so seriously against their own country.

"(2) A final objection to this construction to which I now turn has already been taken by the American minister at Berlin. If at the expiration of two years' residence in Germany, a German naturalized in the United States loses his American nationality, he becomes without any nationality whatsoever, so far as the treaty is concerned, since by the treaty there is no provision made for the resumption of his German nationality. He would, therefore, be in the extraordinary condition of a person without any national ties or allegiance. That he should be allowed to resume his old nationality when he desires is not strange; but it would be very strange, if, without any such desire on his part or any action justifying it, he should thus, by the mere expiration of time, be absolutely deprived of any political status whatsoever.

"In several treaties that have been negotiated by the United States on this topic it is provided that the presumption of intent drawn from a residence of over two years should be open to rebuttal. Perhaps, as a matter of excessive caution, it might be desirable to adopt an article additional to the treaty before us, providing that a two years' residence in the country of origin should only be regarded as *prima facie* proof of renunciation of American naturalization, such proof to be open to corroboration on the one side and to rebuttal on the other side; but it should be clearly understood that this is done without in any way waiving the position that this incident of rebuttability belongs to the clause before us as it stands in the treaty."

Opinion of Mr. Wharton, law officer of Department of State, inclosed by Mr. Bayard, Sec. of State, to Mr. Pendleton, Dec. 18, 1885. MSS. Inst., Germ.; For. Rel., 1885.

As to negotiation of this treaty, see *supra*, § 149.

Under the concurrent effect of article 1 of the treaty with Prussia of 1828, and of article 1 of the treaty with the North German Confederacy of 1868, "Americans, both native and naturalized, should have a free and equal right of peaceable sojourn in Germany if they submit to the laws." The position taken by Germany that these provisions "do not conflict with the position that returning emigrants, even when recognized as naturalized Americans, may, when the accompanying circumstances require, be expelled like any foreigner, but that on principle

this right will be invoked only when maturely considered grounds of the public welfare compel," "does not meet with the assent of this Government." "This Government contends that in the absence of any such voluntary and express manifestation of intent to renounce American citizenship, our citizens can, under the treaty of 1868, claim recognition of their status and all rights of sojourn pertaining thereto during the first two years following their arrival in Germany." * * * "The general doctrine of the right of a nation to expel obnoxious foreigners, whose presence is dangerous to its peace and welfare, from its shores, is well known to this Government, and by none more readily acknowledged; but this right was not lost sight of in framing the treaty of 1868, and while the right is admitted, yet its particular application as regards naturalized Americans is considered in and limited by that treaty."

Mr. Bayard, Sec. of State, to Mr. Pendleton, Mar. 12, 1886. MSS. Inst., Germ. See same to same, Jan. 28, 1886; *ibid.* Same to same, Jan. 29, 1886; *ibid.* See App., vol. iii, § 179.

IV. *LIABILITIES OF NATURALIZED CITIZEN ON RETURNING TO NATIVE LAND.*

(1) While voluntary expatriation is no ground for adverse proceedings, it is otherwise as to acts done by him before expatriation.

§ 180.

"I have just had a full conversation with Baron Gerolt, the Prussian minister, in relation to the case of your brother, Henry D'Oench. The positions maintained by this Department in the case of Koszta will be acted on in all cases to which they may be applicable; but it is apprehended that there are such circumstances of difference in your brother's case as may embarrass the Government in their efforts to procure his discharge.

"Prussia regarded him as a fugitive from justice and claimed from the authorities of Hamburg his extradition as a matter of right, and Hamburg yielded to this claim as a matter of duty arising from its political connection with her. Having got possession of his person and brought him within her jurisdiction, as she contends, in a strictly legal manner, she maintains her right to inflict upon him the punishment to which he has been sentenced by the tribunals of the country for a violation of its laws committed while he was a subject of the King of Prussia. The change of national character subsequent to the alleged offense does not release an offender from penalties previously incurred when legally brought within the jurisdiction of the country whose laws have been violated. It may be found that in this respect there is a difference between the case of your brother and that of Koszta. You may, however, be assured that this Government will use all proper means to effect his release."

Mr. Marcy, Sec. of State, to Mr. D'Oench, Nov. 16, 1853. MSS. Dom. Let.

An Austrian subject who commits an offense against Austrian laws, and then, after becoming a naturalized citizen of the United States, returns voluntarily to Austria, cannot rightfully set up his citizenship in the United States as a bar to a prosecution in Austria for such an offense.

Mr. Marcy, Sec. of State, to Mr. Jackson, Apr. 6, 1855. MSS. Inst., Austria. To same effect, see same to same, Nov. 6, 1854; *ibid.*

"The liability of a citizen of the United States before the courts of Hanover cannot depend upon the question whether he is a native or naturalized citizen, but upon the question only whether he has committed any offense against Hanoverian law. Expatriation, as you have been already instructed, is no offense, and we cannot permit an unreasonable distinction to be made between different classes of our citizens."

Mr. Cass, Sec. of State, to Mr. Wright, Dec. 9, 1859. MSS. Inst., Prussia.
As to annoyances to which Frenchmen naturalized in the United States may be subject on revisiting France, see Mr. Fish, Sec. of State, to Mr. Pintard, Feb. 12, 1874. MSS. Dom. Let.

"In granting the high privilege of its citizenship, the United States does not assume the defense of obligations incurred by the party to whom it accords its citizenship prior to his acquisition of that right, nor does it assume to become his attorney for the prosecution of claims originating prior to the citizenship of the claimant."

Mr. Fish, Sec. of State, to Mr. Davis, Nov. 24, 1874. MSS. Inst., Germ.

"The only provision in the treaty touching the liability of the citizen to punishment on his return appears in the second article, that a naturalized citizen on his return to Germany remains liable to trial and punishment for an action punishable by the laws of Germany *committed before his emigration.* This limitation is plain, and, as it stands, would exclude offenses which consist in a failure to perform military duty, the obligation to which arises after emigration."

Same to same, July 21, 1875. MSS. Inst., Germ.

"Your letter of the 15th instant, inquiring whether a naturalized American citizen, born in France, would be subject to military duty in case he should revisit his native country, has been received.

"In reply, I must inform you that your inquiry belongs to a class respecting which the Department of State refrains from expressing an authoritative opinion in advance of a case actually arising and calling for diplomatic intervention. It may, however, be stated that the Department's understanding of the general French rule in such cases is, that when a male child is born in France, the fact is registered at the place of birth and transmitted to the proper prefecture as of one eventually liable to military duty. On the completion of the twentieth year the individual is summoned to present himself at a designated place.

If residing abroad, the notice is served on him through the consul, or through the parents and relations residing in France."

Mr. Bayard, Sec. of State, to Mr. Wollner, Oct. 24, 1885. MSS. Dom. Let.

While a naturalized citizen who returns to his native country is liable like any other person, to be arrested for a debt or a crime, he cannot rightfully be punished for the non-performance of a duty which is supposed to grow out of his abjured allegiance. An arrest of a former subject, who has become naturalized in the United States, cannot be justified on the ground that he emigrated contrary to the laws of his original country.

9 Op., 356, Black., 1859.

(2) IF HE LEFT MILITARY DUTY DUE AND UNPERFORMED, HE MAY BE HELD TO IT IF HE RETURN AFTER NATURALIZATION.

§ 181.

"The Prussian Government requires of all its subjects a certain amount of military service. However onerous this requirement may be, it is purely a matter of domestic policy, in which no foreign Government has a right to interfere. It appears that there is no exemption from the obligation to render this service in favor of persons wishing to leave the country, unless they apply for and receive from the proper authorities what is termed 'a certificate of emigration.' This 'emigration certificate' seems like an ordinary passport to be granted as a matter of course on application. When the vast extent of the Prussian military establishment is considered and its importance in the monarchy, such a regulation, in reference to persons wishing to emigrate, who, as you are aware, now amount to many thousands annually, cannot be regarded as otherwise than liberal. But even if a different system prevailed, and if the previous rendition of a certain amount of military duty were made the condition *sine qua non* of granting the 'emigration certificate,' however oppressive the rule might be, a foreign Government could have no right to interfere with its execution.

"If, then, a Prussian subject born and living under this state of law chooses to emigrate to a foreign country without obtaining the 'certificate' which alone can discharge him from the obligation of military service, he takes that step at his own risk. He elects to go abroad under the burden of a duty which he owes to his Government. His departure is of the nature of an escape from her laws, and if, at any subsequent period, he is indiscreet enough to return to his native country, he cannot complain if those laws are executed to his disadvantage. His case resembles that of a soldier or sailor enlisted by conscription or other compulsory process in the army or navy. If he should desert the service of his country and thereby render himself amenable to military law no one would expect that he could return to his native

land and bid defiance to its laws, because in the mean time he might have become a naturalized citizen of a foreign state."

Mr. Everett, Sec. of State, to Mr. Barnard, Jan. 14, 1853. MSS. Inst., Prussia.

"This Government cannot rightfully interpose to relieve a naturalized citizen from the duties or penalties which the laws of his native country may impose upon him on his voluntary return within its limits. When a foreigner is naturalized the Government does not regard the obligations he has incurred elsewhere, nor does it undertake to exempt him from their performance. He is admitted to the privileges of a citizen in this country, and to the rights which our treaties and the law of nations secure to American citizens abroad. In this respect he has all the rights of a native-born citizen, but the vindication of none of these rights can require or authorize an interference in his behalf with the fair application to him of the municipal laws of his native country when he voluntarily subjects himself to their control in the same manner and to the same extent as they would apply if he had never left that country. A different view of the duties of this Government would be an invasion of the independence of nations, and could not fail to be productive of discord; it might moreover prove detrimental to the interests of the States of this Union."

Mr. Marcy, Sec. of State, to Mr. Daniel, Nov. 10, 1855. MSS. Inst., Italy.

"It is well known that the laws of most of the German states require of their subjects a certain amount of military service. If they emigrate before they perform it, and, becoming naturalized abroad, return for any purpose to their native country, they are still liable to perform the service."

Mr. Marcy, Sec. of State, to Mr. Florence, Feb. 17, 1857. MSS. Dom. Let.

"It is undoubtedly true that this Government has acquiesced in the opinion expressed by Mr. Wheaton, that when a citizen who has been liable to military duty, leaves his own country without permission, and without having performed this duty, he may be held to discharge this liability whenever he is found again in his native state. This opinion, however, is regarded by this Government as applying, not to cases of inchoate liability, but to cases only where the liability has become complete. To speak of a minor as liable to military service, simply because, if he should live long enough in the country, he might become so, could not be fairly regarded as either appropriate or just."

Mr. Cass, Sec. of State, to Mr. Schleiden, Apr. 9, 1859. MSS. Notes, Hanse Towns.

"If the future liability to do military duty creates a perpetual obligation wherever the party may be, and whatever other responsibilities he may have incurred, the same principle will enable a Government to prevent its subjects or citizens from ever leaving its dominions or

changing their home. It would be a practical denial of all right of expatriation, and a full assertion of the doctrine of perpetual allegiance."

Mr. Cass, Sec. of State, to Mr. Wright, May 12, 1859. MSS. Inst., Prussia.

"The position of the United States, as communicated to the minister at Berlin for the information of the Prussian Government, is that native-born Prussians naturalized in the United States and returning to the country of their birth are not liable to any duties or penalties, except such as were existing at the period of their emigration. If at that time they were in the army or actually called into it, such emigration and naturalization do not exempt them from the legal penalty which they incurred by their desertion, but this penalty may be enforced against them whenever they shall voluntarily place themselves within the local jurisdiction of their native country, and shall be proceeded against according to law. But when no present liabilities exist against them at the period of their emigration, the law of nations, in the opinion of this Government, gives no right to any country to interfere with naturalized American citizens, and the attempt to do so would be considered an act unjust in itself and unfriendly toward the United States. This question cannot, of course, arise in the case of a naturalized citizen who remains in the United States. It is only when he voluntarily returns to his native country that its local laws can be enforced against him."

Mr. Cass, Sec. of State, to Mr. Hofer, June 14, 1859. MSS. Dom. Let.

"In order to entitle his (a naturalized citizen's) original Government to punish him for an offense, this must have been committed whilst he was a subject and owed allegiance to that Government. The offense must have been complete before his expatriation. It must have been of such a character that he might have been tried and punished for it at the moment of his departure. A future liability to serve in the army will not be sufficient, because before the time can arise for such service he has changed his allegiance and has become a citizen of the United States. It would be quite absurd to contend that a boy brought to this country from a foreign country with his father's family, when but twelve years of age and naturalized here, who should afterwards visit the country of his birth when he had become a man might then be seized and compelled to perform military service, because if he had remained there throughout the intervening years, and his life had been spared, he would have been bound to perform military service. To submit to such a principle would be to make an odious distinction between our naturalized and native citizens."

Mr. Cass, Sec. of State, to Mr. Wright, July 8, 1859. MSS. Inst., Prussia.

"This Government maintains the right of expatriation and naturalization, and maintains also that if a foreign-born citizen naturalized here returns to his native country he is not liable to any military duty,

except such as was actually due, and which he had been called upon to perform before his emigration."

Mr. Cass, Sec. of State, to Mr. Mason, July 27, 1859. MSS. Inst., France.

"The naturalized emigrant cannot be made responsible on his return for any military duty unless he had been actually required to perform it before his emigration, and had deserted from it."

Mr. Cass, Sec. of State, to Mr. W. R. Calhoun, Dec. 31, 1859. MSS. Inst., France.

"This Department is frequently called upon to interpose in behalf of naturalized citizens of the United States, who, upon temporary visits to their native countries, are subjected to arrest and imprisonment under the operation of these conscription laws. When any such case is brought to the attention of the Department, its aid and protection is never withheld, nor has this Government omitted any opportunity to urge upon the Governments of Europe a modification of those conscription laws in so far as their operation extends to or affects naturalized citizens of the United States. In the treaties on citizenship and naturalization which exist between the United States and several of the Governments of continental Europe, these Governments, while liberal as to other matters, insist upon excepting liability for undischarged military duties from the schedule of native obligations, from which the subject is to be considered released upon having effected a change in his original nationality."

Mr. Fish, Sec. of State, to Messrs. Shorter & Brother, Mar. 13, 1873. MSS. Dom. Let.

That in Russia any Russian going abroad without permission would be liable, by Russian municipal law, to punishment, whether his military duties were performed or not, see Mr. Wurts to Mr. Bayard, St. Petersburg, June 14, 1885; MSS. Dispatches Russia, For. Rel., 1885. But in case of arrest under such circumstances the Russian Government generally, at the request of the United States, releases the party under conditions, "but this is regarded as a concession from courtesy and not of right." "The Russian Government refuses to admit the right of a foreign state to exempt by naturalization its subjects from their unfulfilled prior duties to the land of their birth." *Ibid.*

As to expulsion from Germany in such cases, see *infra*, § 206.

As to liability of Frenchmen naturalized in the United States to military duty, see Mr. Bayard, Sec. of State, to Mr. Myers, Dec. 7, 1885. MSS. Dom. Let. Mr. Bayard, Sec. of State, to Mr. Spriggs, Jan. 12, 1886; *ibid.*

(3) BUT NO LIABILITY FOR SUBSEQUENT DUTY.

§ 182.

By the decree of the judicial tribunal of Toulouse in 1860, Mr. Puyoon, a Frenchman by birth, but an American citizen by naturalization, was discharged from the military service into which he had been required to enter. "I concur fully with you in opinion that this case and that of Mr.

Zeiter, another American naturalized citizen released in June last, under similar circumstances, by a judicial tribunal at Wessenbourg, recognize the principle that Frenchmen leaving their country and acquiring the character of American citizens, agreeably to our naturalization laws, are not subject to compulsory military service on their return to France as temporary residents. * * *

"Three principles are undeniably established by this exposition of the French law:

"1. That Frenchmen have the right to expatriation, and the right to become citizens of another country.

"2. That by such expatriation and naturalization they cease to be French citizens.

"3. That no person can be a French soldier who is not a French citizen, and naturalization abroad being thus incompatible with service in the French armies, an American naturalized citizen is not subject to the operation of the conscription laws."

Mr. Cass, Sec. of State, to Mr. Faulkner, Oct. 3, 1860. MSS. Inst., France. See *infra*, § 202. See also Mr. Bayard to Mr. Spriggs, Jan. 12, 1886. MSS. Dom. Let.

"With France, our ancient and powerful ally, our relations continue to be of the most friendly character. A decision has recently been made by a French judicial tribunal, with the approbation of the Imperial Government, which cannot fail to foster the sentiments of mutual regard which have so long existed between the two countries. Under the French law no one can serve in the armies of France unless he be a French citizen. The law of France recognizing the natural right of expatriation, it follows as a necessary consequence that a Frenchman, by the fact of having become a citizen of the United States has changed his allegiance and has lost his native character. He cannot, therefore, be compelled to serve in the French armies in case he should return to his native country. These principles were announced in 1852 by the French minister of war, and in two late cases have been confirmed by the French judiciary. In these cases two natives of France have been discharged from the French army because they had become American citizens. To employ the language of our present minister to France, who has rendered good service on this occasion, 'I do not think our French naturalized fellow-citizens will hereafter experience much annoyance on this subject.'"

President Buchanan, Fourth Annual Message, 1860.

"The United States found it necessary to resort to conscription for its own military service. The naturalized citizens generally were neither disloyal nor patriotic, but many of them sought escape from military duty here, under the influence of the same motives which had induced them to seek immunity from similar service in their native

country, by acquiring the privileges of American citizenship. Thus the Government found itself committed, in an extreme conjunction of public affairs, to perplexing controversies with foreign powers, in resisting, on the one hand, their claims for the exemption from our military service of persons who appealed to their protection, and, on the other, the enforcing of claims for the exemption of a like class from military service in foreign countries, on the ground of their having acquired the rights of citizenship in the United States. The President has decided that it is not expedient to urge questions of the latter sort in the present crisis beyond the limits of appeal to the good will and friendly disposition of foreign powers. We ought to discourage rather than encourage, so far as possible, the return of naturalized foreigners, as well as the emigration of our own citizens to Europe."

Mr. Seward, Sec. of State, to Mr. Motley, Apr. 21, 1863. MSS. Inst., Austria. That aliens are not generally compellable to military service, see *infra*, § 202.

"On the other hand, there has been no reservation on the part of the United States in regard to the principle that the process of naturalization in this country completely absolves the person complying with it from foreign allegiance, whoever may have been his sovereign, and invests him with the right equally with native-born citizens to such protection and care of the Government of the United States as it can, in conformity with treaties and the law of nations, extend over him, wherever he may sojourn, whether in the land of his nativity or in any other foreign country. Of course, the United States do not claim or hold that any such naturalized citizen, when transiently traveling or sojourning for a longer or shorter period in a foreign country, can refuse submission to the sovereign authority and obedience to the laws in the country of his temporary residence. All citizens of the United States, when passing through or dwelling in foreign countries, owe obedience and submission to the laws of those countries."

Mr. Seward, Sec. of State, to Mr. Adams, Mar. 22, 1866. MSS. Inst., Gr. Brit.

"The result of our late experience is that a foreign passport may be safely taken as furnishing presumptive evidence of a title to exemption from military service so long, at least, as the Government which grants the passport shall be found to be acting in good faith and in conformity with the law of nations.

"2d. That when a person representing himself to be an alien, and whether producing a passport or not, is conscripted, he shall be at liberty to present his claim, with evidence in its support, to a competent military tribunal, by which the case shall be heard summarily, a discharge by such military tribunal to be final. If, on the contrary, the claim of an alien is overruled by the military tribunal, then the discharge, with the facts relative to the case, shall be remitted to the minister of state charged with the conduct of foreign affairs.

"At every stage of the case the representatives of the nation whose protection is invoked are allowed to intervene."

Mr. Seward, Sec. of State, to Mr. Bigelow, May 7, 1866. MSS. Inst., France. See, as to passports, *infra*, §§ 191 *ff*. As to exemption of aliens, see *infra*, § 202.

For Prince Bismarck's opinion as to the effect, under the treaty of 1868, of the naturalization of Germans in the United States on their obligation to perform military service in Germany, in case of their temporary return thither, see Senate Ex. Doc. 51, 2d sess., 40th Cong.; quoted *supra*, § 149.

As to exemption in Austria of returning naturalized citizens from military duty, see Mr. Fish, Sec. of State, to Mr. Fisher, July 8, 1870. MSS. Dom. Let.

As to Hesse, see Mr. Fish to Mr. Magnus, June 13, 1870; *ibid.*; Mr. Fish to Mr. Kanders, July 12, 1870; *ibid.*

As to North Germany, see Mr. Fish to Mr. Gietz, Feb. 8, 1871; *ibid.*

"A person having served the required three years and being placed on the reserve rolls, having emigrated in time of peace, when no existing obligation to perform military service existed, and having become naturalized in good faith after a residence of five years, and who, although temporarily in Germany, intends in good faith to return and reside in the United States, appears to be secured by the terms of the treaty from punishment for a failure to perform military service when the obligation arises after his emigration."

Mr. Fish, Sec. of State, to Mr. Davis, July 22, 1875. MSS. Inst., Germ. See, as to treaty with Germany, *supra*, § 149.

As to two years' limitation, see *supra*, § 179.

"So far as the knowledge of this Department extends, the effective working of the treaty during the ten years and more of its existence has not proved a hardship to *bona fide* naturalized citizens whose departure from their native land has not been marked by any violation of law, and whose return to Germany has been orderly and for private ends of business or pleasure. In contrary cases it is hardly to be expected that any reciprocal agreement acceptable to both nations would absolutely secure a returning naturalized citizen from the consequences of a punishable act committed on German territory either prior to his expatriation or subsequent to his return."

Mr. Evarts, Sec. of State, to Mr. Williams, of the House Committee of Foreign Affairs, Feb. 5, 1879. MSS. Report Book. See *surpra*, § 149.

"As a general rule, naturalized citizens of the United States of America of German birth are protected by their American citizenship from liability to service in the German army when they temporarily revisit that country. The exceptions to that rule are those arising under the second article of the naturalization treaty between the United States of America and Germany; as, for example, when a man has emigrated while in actual service (desertion) or when enrolled for duty and awaiting a call to service; or if, after attaining the age fixed by German law

for military service, he is guilty of some act or omission with the design of evading such service.

"It is impossible for this Department to say in advance what molestation naturalized American citizens of German birth may meet with from the authorities of Germany by reason of questions arising as to their liability to military duty there. In case of arrest, however, they may be assured of all proper protection from this Government and its representatives."

Mr. Blaine, Sec. of State, to Mr. Lang, Apr. 7, 1881. MSS. Dom. Let. See *supra*, § 149.

"Naturalization is regarded as a purely domestic act, whereof all the conditions are controlled by the law of the naturalizing country; and while in the interest of reciprocal good feeling the United States has been willing to stipulate by treaty that under certain circumstances the act of naturalization here should not protect an Austrian, naturalized in the United States and voluntarily returning to the Empire, from the consequences of violating military law, we cannot admit that any relation in which an alien may stand toward his own Government should be a bar to naturalization as an American citizen, if the applicant be within the jurisdiction of the United States and comply with all the requirements of the statute.

"Sections 1, 2, and 3 of Article II of the treaty aim to except from protection by naturalization, in case the naturalized person returns to his former country, all cases where the offense of evading military duty shall be completed by some intentional act of the offender, committed while yet within Austrian jurisdiction. The hypothetical case presented does not seem to come within this broad principle."

Mr. Frelinghuysen, Sec. of State, to Mr. Taft, Aug. 25, 1883. MSS. Inst., Austria. As to treaty with Austria, see *supra*, § 141.

"From the responses previously made to your inquiries in Mr. Wagner's behalf, it appears that the brunt of the charge against him was that he, a minor, quitted Russian jurisdiction in advance of attaining the age when he might be called upon for military service. He was born at Lodz in 1852, and in 1874 became liable to military service. He came to the United States in 1869, five years before the liability could rest upon him. When the technical offense, styled 'evasion of military duty,' which is the sole charge against him, began to exist as a tangible accusation, Reinhardt Wagner had already, by residence in the United States for more than three years preceding his majority, acquired under our statutes the preliminary rights of citizenship. No nation should assert an absolute claim over one of its subjects under circumstances like these, and it is thought improbable that Russia will persist in such a claim, even if made. There would be no limit to such a pretension, for the taking of a male infant out of Russia might be regarded with equal propriety as an 'evasion' of eventual military serv-

iee. It is tantamount to asserting a right to punish any male Russian who, having quitted Russian territory and become a citizen of another state, may afterward return to Russia.

"This claim is different from that put forth by some Governments for the completion of military duty fully accruing while the subject is within their jurisdiction, and actually left unfulfilled. It is, for example, claimed that a subject who leaves the country when called upon to serve in the army, and becomes a citizen or subject of another state, may, if he returns to the former jurisdiction while yet of age for military duty, be compelled to serve out his term. This rule appears harsh to us, and yet it goes no further, as a matter of fact, than a contention that an obligation of service accruing and unpaid while the subject is a resident of the country, continues, and is to be extinguished in kind by performance of the alleged defaulted service. But, harsh as it is, it is wholly different from the infliction of vindictive punishment, as, for instance, exile for the constructive evasion of an inchoate obligation. To exact the fulfillment of an existing obligation is one thing; to inflict corporal punishment for not recognizing a future contingent obligation is another."

Mr. Frelinghuysen, Sec. of State, to Mr. Hunt, Dec, 22, 1883. MSS. Inst., Russia. As to treaties with Russia, see *supra*, § 159.

Papers relative to the compulsory enlistment of American citizens in the army of Russia prior to 1860 will be found in Senate Ex. Doc. 38, 36th Cong., 1st sess. See also Senate Ex. Doc. 4, 40th Cong., 1st sess.

The correspondence of the United States with Prussia in 1861 as to liability of naturalized citizens to military duty will be found in the Brit. and For. St. Pap. for 1861–'62, vol. 52, 1232. For correspondence with other powers on the same subject see same work, 1862–'63, vol. 53; 1863–'64, vol. 54.

As to expulsion from Germany of Germans naturalized in the United States on ground of non-performance of military service, see *infra*, § 206.

The treaties with specific sovereignties as to naturalization are noticed *supra*, §§ 141 *ff.*

V. *CHILDREN.*

(1) Born in the United States generally citizens.

§ 183.

The fourteenth amendment to the Constitution of the United States provides that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

By section 1992, Revised Statutes, "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

As will be seen elsewhere Indians are held not within this clause, not being "subject to the jurisdiction of the United States." (*Infra*, § 196, *supra*, § 173.) The same reasoning, it may be argued, would exclude

children born in the United States to foreigners here on transient residence, such children not being by the law of nations "subject to the jurisdiction of the United States."

See *infra*, §§ 173, 196, 208; Whart. Com. Am. Law, § 585; McKay *v.* Campbell, 2 Sawyer, 118; Elk *v.* Wilkins, 112 U. S., 94.

"In reply to the inquiry which is made by you in the same letter whether 'the children of foreign parents *born in the United States*, but brought to the country of which the father is a subject, and continuing to reside within the jurisdiction of their father's country, are entitled to protection as citizens of the United States,' I have to observe that it is presumed that, according to the common law, any person born in the United States, unless he be born in one of the foreign legations therein, may be considered a citizen thereof until he formally renounces his citizenship. There is not, however, any United States statute containing a provision upon this subject, nor, so far as I am aware, has there been any judicial decision in regard to it."

Mr. Marcy, Sec. of State, to Mr. Mason, June 6, 1854. MSS. Inst., France.

"The only mode of adoption by which a private citizen can confer citizenship on an alien is that of marrying a female of foreign birth."

Mr. Fish, Sec. of State, to Mr. Morris, Feb. 26, 1870, MSS. Inst., Turkey.

A citizen of the United States cannot by adopting a child of foreign nationality, confer on such child the privileges of citizenship in the United States.

Mr. Fish, Sec. of State, to Mr. Read, Jan. 6, 1872. MSS. Dom. Let.

But if an adoption is good by the laws of any one of the States of the Union, to which an infant is taken by his adoptor, with the consent of the guardians of the party adopted, and accompanied by *bona fide* change of domicil, it would internationally make the person adopted subject to the laws of the State of the adoption.

"It results from inquiry that John Peter Sbarboro was born in Philadelphia November 17, 1852, and that his father was not naturalized until November 6, 1860. The 14th amendment to the Constitution declares that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States.'

"This is simply an affirmance of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage. The qualification, 'and subject to the jurisdiction thereof,' was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality. It is, indeed, possible to read the language as meaning *while* or *when* they are subject to the jurisdiction of the United States, but this would denationalize all citizens, native or naturalized, the moment they entered a foreign jurisdiction.

A contemporaneous exposition of this amendment was given by the 3d section of the act of Congress of July 27, 1868 (15 Stat. L., 224)."

Mr. Fish, Sec. of State, to Mr. Marsh, May 19, 1871. MSS. Inst., Italy.

"The undersigned, Secretary of State of the United States, has the honor to acknowledge the receipt of the note which his excellency the Baron Lederer addressed to him on the 21st day of November, and has given very careful consideration to the facts with reference to the nationality of Francois A. Heinrich therein set forth.

"Baron Lederer brings to the knowledge of the undersigned, for the first time, the important fact that Heinrich had, on more than one occasion, availed himself of Austrian protection, and traveled as an Austrian subject under an Austrian passport.

"This fact, in connection with the provisions of the treaty signed on the 20th of September, 1870, induced a reconsideration of the question, and of the opinion which had been expressed without the information conveyed by Baron Lederer's note with regard to Heinrich's nationality.

"The whole question has been submitted to the examination of the Attorney-General, who is of opinion that, inasmuch as the treaty above referred to provides that citizens of either country (the Austro-Hungarian monarchy and the United States) who have resided in the territories of the other uninterruptedly for five years, and during such residence have become naturalized citizens of the other country, are to be treated as such; and while, as a general rule, a person born in this country, though of alien parents who have never been naturalized, is under the laws of the United States deemed a citizen of the United States, that the treaty clearly recognizes the right of an American citizen to change his nationality and become a subject of Austria.

"Applying these views to the case of Francois Heinrich, the Attorney-General, in view of the statements in the note of Baron Lederer, that under the laws of Austria a foreign-born child of Austrian parents takes the nationality of the latter, and is regarded as an Austrian, and that Francois Heinrich has at different periods obtained passports from the Austrian Government and traveled under their protection as an Austrian subject, taken in connection with the length of time during which he has resided in Austria, thinks these circumstances may be viewed as a sufficient manifestation of consent on his part, at those periods especially, to be a member of that nation; and that such consent co-operating with the law of Austria, to which reference has been made (by which he says it would seem children of Austrian parents born abroad are naturalized at their birth), and accompanied, moreover, by continued residence in that country, effected a complete change in his nationality from American citizenship to Austrian citizenship.

"The Attorney-General concludes by saying, that, in view of all the facts and circumstances appearing in this case, he is of the opinion that,

under the provisions of the aforesaid convention, Francois A. Heinrich should be held by the United States to be an Austrian subject, and treated as such; that he is not an American citizen, and consequently not entitled to protection from this Government.

"Following this opinion of the Attorney-General, the undersigned has the honor in reply to the question addressed to him by Baron Lederer, in his note of the 6th of April last, to say that Francois A. Heinrich is not, and will not be, regarded as a citizen of the United States, so long as he remains within the jurisdiction of the Austro-Hungarian dominion."

Mr. Fish, Sec. of State, to Baron Lederer, Dec. 24, 1872. MSS. Notes, Austria; For. Rel., 1873.

So far as concerns our own local law, a child born in the United States to a British subject, is a citizen of the United States.

Mr. Fish, Sec. of State, to Mr. Ellis, Apr. 14, 1873. MSS. Dom. Let.

The minor child of a Spaniard, born in the United States and while in the United States, or in any other country than Spain, is a citizen of the United States. "The United States has, however, recognized the principle that persons although entitled to be deemed citizens by its laws, may also, by the law of some other country, be held to allegiance in that country."

Mr. Fish, Sec. of State, to Mr. Cushing, Feb. 16, 1877. MSS. Inst., Spain.

"The Constitution provides that all persons born or naturalized in the United States *and subject to the jurisdiction* thereof, are citizens of the United States. Congress has declared by law that the right of expatriation is inherent and inalienable to all citizens of the Republic. In Speck's case, while it is true that the boy by virtue of his nativity, may claim citizenship of theUnited States, yet his father being an alien and continuing to remain a Swiss citizen and having removed the boy Joseph, while a minor, without the jurisdiction of the United States, his status, as well as his domicil, according to well-understood principles of international and municipal law, follows that of the father until the boy attains his majority. Should he, after reaching the age of twenty-one years, voluntarily return to the United States, and make it his permanent home, asserting the right of citizenship in virtue of his nativity, his political status would then be determined according to the law and circumstances of the case."

Mr. F. W. Seward, Acting Sec. of State, to Mr. Fish, Aug. 20, 1878. MSS. Inst., Switz.

A child who, born in the United States to French parents, goes in his minority to France, and there remains voluntarily after he has become of full age, may be held to have abjured his American nationality.

Mr. Evarts, Sec. of State, to Mr. Noyes, Dec. 31, 1878. MSS. Inst., France. See Mr. Evarts to Mr. Hitt, Feb. 13, 1880; *ibid.*

Sons born, in this country, to a German here naturalized, are, though they were taken back for a few years during their minority to Germany, citizens of the United States, they having returned to this country before arriving at full age, and electing it as their domicil when arriving at full age. It follows from this "that any property which they may now possess in the German dominions, and any property which they may hereafter acquire in that country * * * must be held to be free from liability on grounds arising from their refusal to submit themselves to that Government for the performance of military service."

Mr. Evarts, Sec. of State, to Mr. White, June 6, 1879. MSS. Inst., Germ. For further proceedings in this case, see Mr. Evarts to Mr. White, July 28, 1880; *ibid.* Mr. Frelinghuysen to Mr. Evarts, Feb. 15, 1882; *ibid.* Mr. Frelinghuysen to Mr. Kasson, Feb. 7, 1885; *ibid.*

Minor children, born in this country to naturalized citizens, afterwards temporarily visiting Germany, are entitled to passports to return to the United States on the eve of their coming of age.

Mr. Evarts, Sec. of State, to Mr. White, Apr. 23, 1880. MSS. Inst., Germ.

A person born in the United States has a right, though he has intermediately been carried abroad by his parents, to elect the United States as a nationality when he arrives at full age.

Mr. Evarts, Sec. of State, to Mr. Cramer, Nov. 12, 1880. MSS. Inst., Denmark. See Mr. Evarts to Mr. Hitt, Feb. 10, 1880. MSS. Inst., France.

The child born to an alien in the United States loses his citizenship on leaving the United States and returning to his parent's allegiance.

Mr. Blaine, Sec. of State, to Mr. O'Neill, Nov. 15, 1881. MSS. Dom. Let.

A child born in this country to a German subject is subject, if he put himself in German jurisdiction, to German laws.

Mr. Frelinghuysen, Sec. of State, to Mr. O'Neill, Aug. 8, 1882. MSS. Dom Let.

A child born in this country to a foreign father, when taken by his father abroad, acquires the father's domicil and nationality.

Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, June 4, 1883. MSS. Inst., Switz.

"Your No. 36, of the 13th of October last, reports your recent action upon two naturalization cases, concerning which you desire the supervisory consideration of this Department.

"The first case, of Ludwig Hausding, appears to have been decided according to the law and the facts. It is stated that having been born in the United States of a Saxon subject, he was removed to his father's native land, where he has ever since remained, although his father has subsequently become a citizen of the United States. You refused a passport on the ground that the applicant was born of Saxon subjects, temporarily in the United States, and was never "dwelling in the United States," either at the time of or since his parent's naturalization, and

that he was not, therefore, naturalized by force of the statute, section 2172, Revised Statutes.

"It does not appear from your statement whether Wilhelm Hausding, the father, had declared his intention to become an American citizen before the birth of Ludwig. While this, if it were established, would lend an appearance of hardship to an adverse decision upon his claim to be deemed a citizen, yet, even in this case, as the statutes stand, your decision would conform to the letter of the law, section 2168, which admits to citizenship, on taking the oath prescribed by law, the widow and children of an alien who has declared his intention but dies before completing his naturalization. By providing for special exemption excludes the idea of any other exemption, as for instance in the case of the non-completion of the father's naturalization before the permament removal of the minor son from the jurisdiction of the United States.

"Not being naturalized by force of the statute, Ludwig Hausding could only assert citizenship on the ground of birth in the United States; but this claim would, if presented, be untenable, for by section 1992, Revised Statutes, it is made a condition of citizenship by birth that the person be not subject to any foreign power.

"This last consideration serves also to answer the 'quære' which you annex to your statement of the Hausding case. You ask: 'Can one born a foreign subject, but within the United States, make the option after his majority, and while still living abroad, to adopt the citizenship of his birthplace? It seems not, and that he must change his allegiance by emigration and legal process of naturalization.' Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation; that the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship; and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute. No statute contemplates the acquisition of the declared character of an American citizen by a person not at the time within the jurisdiction of the tribunal of record which confers that character.

"Your decision granting a passport in the case of Johannes Weber is approved. In a case like this much depends upon the bona fides of the applicant, and his evident intent to return to the United States, as to which the minister must necessarily be the best judge of his duty in granting or withholding a passport.

"Your second 'quære,' as to the meaning of the phrase 'if dwelling in the United States,' found in section 2172, Revised Statutes, is one of a hypothetical class as to which the general rule of the Department counsels no decision being made in advance of a specific case arising. No such case has, so far as I know, been presented for the decision of the Executive or courts of the United States.

"It would, however, be in fact difficult to see how, in the light of section 1999 of the Revised Statutes, which declares any decision of any

officer of the Government tending to restrict the right of expatriation and change of allegiance to be 'inconsistent with the fundamental principles of the Republic,' and of section 2000, which declares that 'all naturalized citizens of the United States while in foreign countries are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens,' any branch of the Government could well maintain that the children of persons duly naturalized in the United States, and therefore also citizens by law, should lose that status by the mere act of passing beyond the territorial jurisdiction of the United States, especially if they passed within the limits of a third state not of the original allegiance, which could under no circumstances lay claim to their subjection. It can be seen how such an interpretation might regard a citizen of the United States as a citizen of no country whatever, through the sole fact of setting foot outside of our territory, and how, by again setting foot within our borders, his right of citizenship might be deemed to revive unimpaired.

"As you remark, 'the construction of the phrase as meaning that the minor children who become citizens through the naturalization of their father must be, at the time of their father's naturalization, dwelling in the United States, would allow a young man to join his father in the United States a week before his naturalization, and return to his native land a week after, a full-fledged American citizen, while still in his minority, and without renunciation of old allegiance or swearing to the new.' That such a thing is possible is a defect in our existing naturalization laws.

"The President, in his last message, called the attention of Congress to the advisability of recasting the statutes in this respect, in order to remove obscurities and contradictions, and surround the acquisition of American citizenship with safeguards commensurate with the high privileges and obligations which it confers and creates."

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, Jan. 15, 1885; MSS. Inst., Germ.; For. Rel., 1885.

For cognate instructions, see *infra*, § 184.

As to right of such parties to protection, see *infra*, § 190.

Your No. 24, in regard to the request of Richard Greisser for a passport, has been received. In reply, I have to say that on general principles of international law I do not consider that Richard Greisser is a citizen of the United States. He was, it is true, born in 1867 in the State of Ohio. His father, however, was at that time a German subject, and, so far as we can gather from the facts stated, domiciled in Germany. The son, therefore, so far as concerns his international relations, was at the time of his birth of the same nationality as his father. Had he remained in this country till he was of full age and then elected an American nationality, he would on the same general principles of international law be now clothed with American nationality. But so far from this being the case, he left this country with his

mother when he was under two years old, apparently joining the father in Germany, to which country the latter had previously returned, and then, after his father's death, moved with his mother to Switzerland. His technical nationality and domicil would, therefore, during his minority and his father's life, be in Germany, and afterwards in Switzerland.

"It does not follow, however, that though on general principles of international law his nationality and domicil are in Germany, he may not in this country by force of our special legislation be a citizen of the United States and as such entitled to a passport. We have in the naturalization legislation of modern civilized states numerous illustrations of the rule that the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation, and we have, therefore, to inquire how far the rule above stated is affected by the legislation of the United States.

"By section 1992, Revised Statutes, enacted in 1866—

"'All persons born in the United States, *and not subject to any foreign power*, excluding Indians not taxed, are declared to be citizens of the United States.'

"By the fourteenth amendment of the Constitution of the United ratified in 1868—

"'All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State in which they reside.'

"Richard Griesser was no doubt born in the United States, but he was on his birth 'subject to a foreign power' and 'not subject to the jurisdiction of the United States.' He was not, therefore, under the statute and the Constitution a citizen of the United States by birth; and it is not pretended that he has any other title to citizenship."

Mr. Bayard, Sec. of State, to Mr. Winchester, Nov. 28, 1885. MSS. Inst., Switz.; For. Rel., 1885.

In this case it is also to be observed that the applicant, according to the test applied above by Mr. F. W. Seward, August 20, 1878, was at the time of the application not "subject to the jurisdiction" of the United States. See de Bourry's case, *infra*.

"It has been settled by frequent rulings in this Department that when a child, who is born in the United States to a father temporarily here residing, returns with his father to the latter's country of native allegiance, such child cannot, during his minority and his residence in such country, call on this Department to intervene in his behalf against such country. In the present case, the child was posthumous; the father, though he had taken up a 'permanent residence' here, and had therefore acquired a New York domicile, had been here but four years at the time of his death, and had not been naturalized; and the mother, in 1870, when the child was one year old, took him back to Germany, where she has resided with him ever since. An interesting question here

arises as to whether a widowed mother can, by the principles of international law, change, by her own action without the approval of the court of the child's domicil, the child's domicil and nationality. That it cannot be so changed is held by eminent continental jurists. (Bar., § 31; 1 Foelix, pp. 54, 55, 94; Denisart, Domicile, § 2.) 'Der Wittwe,' says Bar, whose authority both in Germany and this country is deservedly high, 'kann dagegen das Recht das Domicil ihrer minderjährigen Kinder zu verändern, nicht zugestanden werden.' To the same effect is Lamar *v.* Micou, 112 U. S., 452. According to this view, the mother of the child in question could not, on the bare facts stated to us, change his domicil so as to withdraw him from the protection of the United States. But as he is now in Germany, the question is one which, if military service be insisted on, must be presented to the German Government for consideration, and their views heard, before this Department can express any final determination in this relation.

"The treaty of 1868 provides that 'citizens of the North German Confederation, who become naturalized citizens of the United States and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.' This, however, does not say that persons not falling within this class who are domiciled in the United States shall not obtain from Germany those rights to which such persons are entitled by international law."

Mr. Bayard, Sec. of State, to Mr. Liebmann, July 9, 1886. MSS. Dom. Let.; *infra*, § 190.

"Your No. 192, of the 1st instant, in reference to Mr. Freiderich de Bourry's claim for a passport, is now before me, and I take the opportunity to express my satisfaction with the clearness of its statements and the accuracy of the distinctions it makes.

"Freiderich de Bourry, according to the allegations in his memorial, was born in the city of New York, on December 4, 1862, of Austrian parents, then temporarily resident in that city, and there remained with them until he was five years of age, when he accompanied his mother to Europe. In 1869 he and his mother, residing in Vienna, were joined in that city by his father, who died in 1880. Under the Austrian Government Freiderich de Bourry, the memorialist, has remained until this day, employed in the Austrian railway service. It is not claimed that his father was ever naturalized, or made the requisite declaration of his intention to become a citizen of the United States, or in any way signified his intention formally to abjure his Austrian allegiance. Nor is it pretended that when, on December 5, 1883, the present memorialist arrived at full age, he took any steps to make or record his election of citizenship in the United States. For several years before that date he was old enough, with his mother's permission, which it is plain from her affidavit she was ready to give, to come to the country of his birth

if it had been the country of his intended citizenship. He alleges no effort of this kind, nor any act or event indicating his election of United States citizenship when he arrived at full age.

"Under these circumstances it is not necessary for me to consider the question whether Freiderich de Bourry was, at the time and his birth, a citizen of the United States under the naturalization statutes and the fourteenth amendment of the Constitution of the United States. It is enough to say that he has exhibited no such proof of an election, on arriving at full age, of United States citizenship as now entitles him to a passport. An election, in a case of dual or doubtful allegiance, which is the utmost which can be claimed in the present case, must be made on attaining majority, or shortly afterwards, and must be signified by acts plainly expressive of intention, such as immediate preparations to return to the elected country.

"In the present case there is no evidence that an election to become a citizen of the United States was ever made or intended, but on the contrary all the facts create the presumption that an Austrian domicile was chosen.

"The passport must therefore be refused."

Mr. Bayard, Sec. of State, to Mr. Lee, July 24, 1886. MSS. Inst., Austria.

The widow of a citizen of one State does not, by marrying again and taking the infant children of the first husband from that State to live with her at the home of the second husband in another State, change the domicil of the children, nor can a guardian of such children, without leave of court.

Lamar *v.* Micou, 112 U. S., 452. See Whart. Confl. of Laws, § 116.

Children born in the United States of alien parents, who have never been naturalized, are native-born citizens of the United States.

10 Op., 328, Bates, 1862. See U. S. *v.* Rhodes, 1 Abb. U. S., 28.

(2) So of children of naturalized citizens.

§ 184.

By section 2172 of the Revised Statutes "the children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary war, shall be admitted to

become a citizen without the consent of the legislature of the State in which such person was proscribed."

As to special provisions for naturalization of widows and children of declarants who have made declaration but died before naturalization, see Rev. Stat., § 2168; as to seamen, § 2174.

The 4th section of the act of April 14, 1802 (Rev. Stat., § 2172) (making children of naturalized persons citizens, and extending citizenship to children born abroad to citizens), "is only a municipal law, and can have no effect beyond the jurisdiction of this country, and especially in Holland, if it should be in conflict with the local law of that country. If, therefore, Johannes (whose citizenship was contested) voluntarily placed himself within Dutch jurisdiction, his rights and his obligations must be measured by the laws of Holland and not by the laws of the United States."

Mr. Marcy, Sec. of State, to Mr. Wendell, Sept. 7, 1854. MSS. Dom. Let.

But this only holds good on the supposition that the act in question is not in fact in harmony with the law of nations, which it is, as the law of nations is now understood.

That a municipal law when conflicting with the law of nations has of itself no extraterritorial effect, see *supra*, § 9.

When the naturalized father of a minor child, born in this country, returns to his native land and resumes his original allegiance, the child on arriving at full age, may elect which allegiance he will accept.

Mr. Seward, Sec. of State, to Mr. Banks, Apr. 7, 1868. MSS. Dom. Let.

"The laws of the United States on the subject of naturalization provide, in relation to persons situated as your sons are, 'that the children of persons duly naturalized under any of the laws of the United States, * * * being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, *if dwelling in the United States*, be considered as citizens of the United States.' Assuming that your three sons were born in France, accompanied you to this country and have continued to reside here (the fact is not distinctly stated in your letter), they, together with your son born here, are, under the provision just cited, to be considered, when dwelling in the United States, citizens of the United States, with all the rights and privileges attaching to that character, and entitled to the protection which this Government extends to all its citizens in the exercise and enjoyment of those rights.

"This Department does not as a rule undertake to give information upon the laws of other countries, nor as to the construction which those countries may put upon their own laws in applying them to persons found within their territorial jurisdiction.

"It is understood to be a provision of the law of France that when a Frenchman has lost his quality of French citizen he cannot serve in the armies of that country, and that when that quality has been lost for

over three years he will not be punished for 'insoumission.' These questions, however, have to be determined in a civil court in France, and it should be remembered that during their pendency the party is liable to arrest, detention, and, it may be, imprisonment, besides the expense of employing counsel.

"In a recent dispatch from Mr. Washburne, our minister at Paris, it is stated that naturalized citizens of the United States born in France, upon returning to the place of their birth have been of late sometimes subjected to great inconvenience and expense on account of claims of the nature alluded to for their military service.

"The Department cannot, in view of these facts, give any advice to persons situated as your sons are, upon the propriety or otherwise of their subjecting themselves to such possible annoyances and inconveniences by visiting France. On these questions the party must judge for himself, with the knowledge that he personally assumes the risk and responsibility of such expenses and inconveniences as he may thereby be subjected to."

Mr. Fish, Sec. of State, to Mr. Jouffret, Feb. 11, 1874. MSS. Dom. Let.

"Your No. 974 of the 13th ultimo, presents a recent case in which application was made to your legation for a passport for the minor son of a naturalized citizen of the United States, the father having been born in Germany, while the son was born in Mexico. You refer to a law of Mexico, by which children born in that country of alien parents shall, on attaining their majority, elect for either Mexican citizenship, or that of their parents, and in view of those antecedents you inquire, (1st) whether it is the practice of the Department to issue separate passports to the minor children of citizens of the United States unaccompanied by their parents; and (2d) whether, in the case reported, you would have been justified in issuing a separate passport to the minor son.

"It is observed that you omit to mention whether the father was a naturalized citizen of the United States at the time of the birth of the son. If not, residence in the United States is a condition of the son's citizenship. (See Rev. Stat., § 2172.) It is presumed, however, from your statement, that the father was an American citizen sojourning in a foreign land at the time of the son's birth.

"Answering your inquiries in general terms, and without assuming to decide the case now presented without fuller information, it may be observed:

"First. That a passport can properly be issued to a minor of discreet age, unaccompanied by his parents, when the facts show honest and bona fide motive for soliciting a separate passport; and,

"Secondly. That, until coming of age, a child born abroad of American parents and continuing abroad, is an American citizen, and as such entitled to a passport. If on attaining majority the laws of the country of his birth require option for either his inherited or his native citizen-

ship, and if he chooses to avail himself of such laws and renounce his American status, that is another matter; and such option is all that is contemplated by the Mexican law referred to, as it is here understood from your description. But that statute does not make such a minor a Mexican during minority, nor prevent his remaining an American under American law; still less can it leave him a nondescript with no nationality whatever."

Mr. F. W. Seward, Acting Sec. of State, to Mr. Foster, July 2, 1879. MSS. Inst., Mex.; For. Rel., 1879.

As to Mexican statute, see *supra*, § 172*a*.

"Your dispatch, No. 996, of the 18th ultimo, presents an interesting question concerning the citizenship and rights of the minor children of the late James W. Smith, which had been submitted to you by the late consul-general.

"It appears that, after lending important services to the republicans of Mexico during the French intervention, and the Empire of Maximillian in 1866–'67, Mr. Smith took active part in 1876 in the successful revolutionary movement of General Diaz, became a colonel in the Mexican army, and was understood to be in such service at the time of his death, of which the date is given as June 5, 1879.

"You further quote the provision of the Mexican law of January 30, 1856, enacting the naturalization, apparently without any additional formality beyond the fact of service, of a foreigner who 'accepts any public office of the nation, or belongs to the army or navy,' and in view of this you ask in general terms for the views of the Department upon the status of Americans accepting service under the Mexican Government, and also specific instructions on the points presented in Mr. Strother's letter to you of the 15th ultimo, a copy of which you transmit.

"In answer to the first point presented by you, I may observe that on the 27th of July, 1868, Congress declared that the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of 'life, liberty, and the pursuit of happiness.' (Section 1999, Revised Statutes.) The act of changing allegiance and citizenship must necessarily conform to the laws of the country where the American who voluntarily expatriates himself becomes a citizen or subject. No law of the United States, for instance, can make a Mexican citizen out of one of our own citizens, or prevent him from becoming a Mexican citizen by the operation of Mexican law. Mr. Smith, by the act of voluntarily taking military service under the Government of Mexico while a law was in existence by which such an act on his part conferred and involved the assumption of Mexican citizenship, must be deemed to have understandingly conformed to that Mexican law, and of his own accord embraced Mexican citizenship. Under the enactment of Congress, previously quoted, no permission of the Government of the United States is necessary to the exercise of the right of expatriation. This answers the first question put by Mr. Strother.

"The second and third inquiries respecting the status of the minor children are not so easy to answer. The two sons of Mr. Smith, aged respectively seven and ten years at the time of their father's death, were undoubtedly American citizens by birth, inasmuch as the father's change of allegiance occurred after the birth of the youngest child. If within the jurisdiction of the United States their right to American citizenship would be unimpaired, and even if within Mexican jurisdiction during minority they would, in the absence of any Mexican law specifically attaching the altered status of the father to his minor children within Mexican jurisdiction, be still properly regarded as American citizens. But if there be such a law, or if on attaining majority they remain in Mexico and come within any provision of Mexican law making them citizens of that Republic, they could not be regarded as citizens of the United States.

"The registration of the younger son, by the widowed mother, after the death of the father, although irregularly and unnecessarily delayed, is in contravention of no rule, the child's citizenship *at birth* being clear."

Mr. F. W. Seward, Acting Sec. of State, to Mr. Foster, Aug. 13, 1879. MSS. Inst., Mex.; For. Rel., 1879.

A boy of eighteen years, who has never been out of Germany, but whose father is a naturalized citizen of and resident in the United States, is not entitled to obtain the interposition of this Government to secure him from military service in Germany, or to relieve him from being detained in Germany for that purpose.

Mr. Evarts, Sec. of State, to Mr. Caldwell, Mar. 6, 1880. MSS. Dom. Let.

The son, living in Spain, of a naturalized citizen of the United States, cannot consistently with the law of nations, be required in that country "vicariously" to perform his father's military duties.

Mr. Evarts, Sec. of State, to Mr. Fairchild, May 11, 1880. MSS. Inst., Spain.

Section 2172 of the Revised Statutes is regarded "as applicable to such children as were actually residing in the United States at the time of their father's naturalization, and to minor children who come to the United States during their minority and while the parents were residing here in the character of citizens."

Mr. Blaine, Sec. of State, to Mr. Kasson, Mar. 31, 1881. MSS. Inst., Austria; For. Rel., 1881.

"The provision of the act of the 14th of April, 1802 (section 2172, Revised Statutes of the United States), has received both executive and judicial construction. The Attorney-General of the United States (Bates), in 1862, held that 'under the 4th section of the act of April, 1802, to establish a uniform rule of naturalization, &c., such children, if dwelling in the United States, are declared citizens.' 'That section,' continues the Attorney-General, 'provides in brief that the children of persons duly naturalized under any of the laws of the United States,

etc., being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States.

"'The section of course refers to children born out of the United States, since the children of such persons born within the United States, are citizens without the aid of statutory law.' (10 Op., 329.)"

Mr. Davis, Acting Sec. of State, to Mr. Brulatour, July 30, 1883. MSS. Inst., France.

"There are but three methods known to me for obtaining the rights of an American citizen. Those entitled to such rights are:

"(1) Children born in the United States, and subject to the jurisdiction thereof.

"(2) Children born of American parents whose fathers have resided within the United States; and,

"(3) Those embraced by the naturalization law, which would include those naturalized and their children minors at the time of naturalization, if within the jurisdiction of this country.

"I cannot see that this child born abroad presumably of foreign parents is by the act of adoption under a State law brought within either of these provisions prescribing United States citizenship."

Mr. Frelinghuysen, Sec. of State, to Mr. Willis, Feb. 21, 1884. MSS. Dom. Let.

"Your dispatch, No. 124, of the 6th ultimo, reports the correspondence had by you with the foreign office in the case of Ferdinand Revermann, a citizen of the United States by birth, lately expelled from Germany. The decision of the German Government, as communicated by you, broadly covers the questions of the treaty rights of naturalized Germans returning to Germany, and of their sons born American citizens.

"The same general questions have been recently examined, and the views of this Department communicated fully by instructions No. 83 of the 15th ultimo, and No. 84 of the same date.

"Lest silence should be construed as acquiescence in the position now taken by Germany, it seems proper to put on record some observations touching it. For this purpose it does not seem necessary to recite and discuss the particular case of Revermann; it will suffice to merely notice certain points of Dr. von Busch's note of December 31, 1884.

"That note professes only to deal with the case of the sons of naturalized and returning fathers. But it lays down the following rule:

"'As regards the father of such sons, no doubt can exist that they are to be regarded as having renounced their naturalization by a longer sojourn than one or two years pursuant to the treaties regulating nationality of 1868 concluded with the United States.'

"My instruction to you, No. 84, of the 15th ultimo, deals with this question.

"We think it clear that the treaty cannot of itself convert an American citizen back again to a German, any more than it can make a German a citizen of the United States.

"There are, it is believed, many persons now in Germany whose sojourn has extended beyond the term of two years without their being called upon to resume German allegiance. In all their relationships to this Government they retain American citizenship. There is between them and the authorities of their place of sojourn no relationship, implying resumption of their original status, and no jurisdictional rights are exercised over them.

"As to the sons of such fathers, who, being citizens by birth, may visit the land of their father's allegiance, the decision of the German Gavernment is just. They are original citizens in their own right, and the treaty does not relate to them. In all respects they stand on the same footing as native Americans of American parentage. This being so, the contention of the German Government, that such sons may be expelled from Germany on abrupt notice, at the pleasure of the authorities, under the alternative of becoming German subjects, is tantamount to claiming the right to expel any citizen of the United States in like manner and with the like alternative, which, of course, would conflict with the provisions of the existing treaty.

"Such sons are admittedly and rightfully not within the provisions of the naturalization treaty of 1868. Then, as American citizens by native right, they must come under the general provisions of treaty affecting all American citizens who have not been naturalized.

"This Government does not suppose that it will be called upon to acquiesce in the arbitrary establishment of a class of citizens who have no rights under either treaty, but who may any day be called upon to instantlly become naturalized as German subjects or hastily expelled from the country, without time for preparation.

"Dr. von Busch's claim that 'international principles permit the refusal to such persons of sojourn in Germany,' in the interest of public order, 'when the actual circumstances indicate that the persons in question use their American citizenship only for the purpose of withdrawing themselves from the duties, and, in particular, from the military duty devolving upon the domestic population, without being disposed to abandon their permanent sojourn in Germany and the advantages connected therewith,' is not fully understood by me; and perhaps its objectionable character may disappear on further explanation; but so far as I understand it, I cannot see why this line of argument does not apply to any and every native-born American citizen of military age who, for purposes of business, study, or pleasure, may take up a peaceable abode in Germany, whether he has relatives in that country or not.

"The singular character of Dr. von Busch's contention, and the remarkable consequences which might, if it were admitted, flow therefrom, make it advisable that its true purport should be better understood before instructing you more definitely in the case of Ferdinand Revermann.

"You will therefore take an early occasion to point out the contradictions involved in the German reply, and the difficulty we would find in acquiescing therein."

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, Feb. 7, 1885. MSS. Inst., Germ.; For. Rel., 1885.

As to expulsions, see *infra*, § 206.

Under ordinary circumstances the status of a son born in the United States to a German naturalized in the United States would follow that of his father when his father returns with the infant child to Germany from the United States and resumes a German nationality. But it is otherwise when the father's resumption of German nationality by its own terms excludes from its purview the case of his son. "The doctrine of the changing of an infant's nationality with the nationality and domicil of the father rests on the assumption that such is the father's will and that the change is in submission to his paternal power. When, as in the present case, the father's will is that the child should retain his prior nationality and domicil, then the father's change of nationality and domicil does not affect the child."

Mr. Bayard, Sec. of State, to Mr. Pendleton, May 12, 1885. MSS. Inst., Germ.

Under section 2172 of the Revised Statutes a child of a naturalized citizen of the United States, in order to become himself a citizen of the United States, must dwell therein.

Mr. Bayard, Sec. of State, to Mr. Cramer, May 22, 1885. MSS. Inst., Switz.

To same effect see Mr. Bayard, Sec. of State, to Mr. Cole, Nov. 9, 1885; MSS. Dom. Let.; Mr. Porter, Acting Sec. of State, to Mr. Portal, June 16, 1886. MSS. Dom. Let.

"With reference to your dispatch No. 27, of the 17th ultimo, in relation to the case of Mr. Charles Drevet, I have to inform you that the Department has had the matter under consideration.

"It appears from your communication that Mr. Charles Drevet was born September 28, 1864, at Paris, in which city he has ever since resided. His father, Leon Drevet, a Frenchman, came to the United States in 1852. In July, 1858, he made his declaration of intention; in February, 1859, he married an American lady; in 1860 he went back to France; in 1869 he returned to America; in the same year (June 3, 1869) he took out his second papers, and shortly after resumed his residence in France, where he has ever since remained. The son has always lived in France; the father has been domiciled there for many years; neither the son nor the father has expressed any intention of residing in this country at any time in the future.

"Under these circumstances Mr. Charles Drevet has asked your legation to furnish him with a certificate required by the French law of December 16, 1874, to the effect that he is considered by this Government to be an American citizen.

"The Department holds, under section 2172 of the Revised Statutes, that as Mr. Charles Drevet was not at the time of the naturalization of his father dwelling in the United States; that as he has never resided in this country, and never intends to do so, he cannot be considered to be an American citizen. You will, therefore, decline to issue a passport to him as such, that being the only attestation of nationality which could have been granted by your legation in case the facts should have shown him to be an American citizen."

Mr. Bayard, Sec. of State, to Mr. McLane, July 4, 1885. MSS. Inst., France; For. Rel., 1885. See Mr. Bayard to Mr. Pendleton, July 7, 1885, quoted *infra*, § 206.

"Your dispatch No. 229, of the 8th instant, referring to the passport application of Robert Emden, has been received. This seems to be the same case as the one referred to in your No. 203, of the 16th of February last, which was fully disposed of in instruction No. 130, of the 10th of March last, approving your letter to Mr. M. P. Emden, of the 11th February last. In that dispatch the name of Mr. M. P. Emden's eldest son was not given, but it is supposed that the Robert Emden in your No. 229 is the eldest son previously alluded to. This Department sees no reason to change its former decision, as conveyed in instruction No. 130, that the passport application of Mr. Robert Emden, although he is the son of naturalized American, cannot be granted, because he is not and never has been 'dwelling in the United States,' according to section 2171 of the Revised Statutes, which phrase it is noticed is carefully omitted from the version of the statute given in Mr. Robert Emden's letter of the 15th of April last to you, if the copy of it inclosed in your No. 229 is correct."

Mr. Bayard, Sec. of State, to Mr. Cramer, June 27, 1885. MSS. Inst., Switz.; For. Rel., 1885. See, as to George's case, *infra*, § 206.

Robert Emden was born in Switzerland in 1862, and at the time of his application in 1885 for a passport, had never been in the United States. His father, a Swiss by origin, was naturalized in New York in 1854, but soon afterwards returned to Switzerland, where he continued afterwards to reside.

"Undoubtedly, by the law of nations, an infant child partakes of his father's nationality and domicile. But there are two difficulties in the way of applying this rule to the present case. In the first place a parent's nationality cannot, especially when produced by naturalization, be presumed to be adhered to after a residence in the country of origin

for so long a period as in the present case. In the second place, the rule as to children only applies to minors, since when the child becomes of age he is required to elect between the country of his residence and the country of his alleged technical allegiance. Of this election two incidents are to be observed; when once made it is final; and it requires no formal act, but may be inferred from the conduct of the party from whom the election is required.

"Applying these tests to the present case it can hardly be said that Mr. Robert Emden's claim to be a citizen of the United States is, as a matter of international law, made out. The burden of proof is always on the applicant for the passport, and here there is no evidence to prove either his father's non-abandonment of his United States citizenship or his own election of such citizenship, save the applications of father and son for passports.

"In the foregoing remarks the sections of the Revised Statutes bearing on questions of this class have not been considered. These sections are as follows:

"'SEC. 2172 [originally enacted April 14, 1802]. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the States, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof. * * *

"'SEC. 1993 [originally passed April 9, 1866]. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.'

"If reliance is placed on the first clause of section 2172, the application must fail, since that clause applies only to children 'dwelling in the United States.' If, however, Mr. Emden seeks to come in under the second clause of section 2172, or under the more general terms of section 1993, he is met with the difficulty that he is no longer a 'child,' but that he is of full age, and that his citizenship is no longer derivative, but is a matter of personal election. If he solemnly elected, on arriving at full age, to be a citizen of the United States, the proofs of such election must be produced. If, on the other hand, he made no such election, but by remaining in Switzerland is to be inferred to have accepted Swiss nationality, he cannot now obtain a passport as a citizen of the United States. If this be the case his proper course, should he

desire to become a citizen of the United States, is to come here in person and become naturalized."

Mr. Porter, Acting Sec. of State, to Mr. Winchester, Sept. 14, 1885. MSS. Inst., Switz.; For. Rel., 1885.

Under the act of 1802 (2 Stat. L., 153, Rev. Stat., § 2172), a minor child of a father so naturalized became a citizen, though not then within the United States, provided she was resident therein at the time of the passage of the act.

Campbell *v.* Gordon, 6 Cranch, 176.

Children born abroad of aliens who subsequently emigrated to this country with their families, and were naturalized here during the minority of their children, are citizens of the United States.

10 Op., 329, Bates, 1862.

A Prussian subject by birth emigrated to the United States in 1848, became naturalized in 1854, and shortly afterwards returned to Germany with his family, in which was a son born in the United States, and became domiciled at Wiesbaden, where, together with his family, he has since continuously resided. The son having reached the age of twenty years, has been called upon by the German Government for military duty. The father invoked the intervention of the United States legation at Berlin, but declined in behalf of the son to give any assurance of intention on the part of the latter to return to the United States within a reasonable time and assume his duties as a citizen.

Article IV of the naturalization treaty between the United States and North Germany of 1868 reads as follows: "If a German naturalized in America renews his residence in North Germany without the intent to return to America, he shall be held to have renounced his naturalization in the United States. * * * The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country."

It was held (1) that under the above article, the father must be deemed to have abandoned his American citizenship and to have resumed the German nationality; (2) that the son, being a minor, acquired under the laws of Germany the nationality of his father, but did not thereby lose his American nationality; (3) that upon attaining his majority, the son may, at his own election, return and take the nationality of his birth or remain in Germany and retain his acquired nationality; (4) yet that during his minority and while domiciled with his father in Germany, he cannot rightfully claim exemption from military duty there.

15 Op., 15, Pierrepont, 1875.

A Spanish subject by birth was naturalized in the United States in February, 1876, and thereupon his son, aged twenty, who was born in the Island of Cuba, applied to the State Department for a passport, stating that he had resided in the United States for five years, but that

it was his intention to resume his residence in the Spanish dominions and engage in business there. It was held that the son, being a minor at the time of his father's naturalization, must be considered a citizen of the United States within the meaning of section 2172, Revised Statutes, and as such entitled to a passport, and that the circumstance that he intended to reside in the country of his birth did not make him less entitled than if his destination were elsewhere.

15 Op., 114, Taft, 1876.

(3) So of children born abroad to citizens of the United States.

§ 185.

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States, but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Rev. Stat. § 1993, founded on acts of April 14, 1802, chap. 28, § 4, 2 Stat. L., 155, and Feb. 10, 1855; chap. 71, § 1, 10 Stat. L., 604. See *supra*, § 171.

"It is provided by law that 'all children born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are to be declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.' That the citizenship of the father descends to the children born to him when abroad, is a generally acknowledged principle of international law."

Printed Pers. Inst. Dip. Agents, 1885.

"If, by the laws of the country of their birth, children of American citizens, born in such country, are subjects of its Government, the legislation of the United States should not be construed so as to interfere with the allegiance which they owe to the country of their birth while they continue within its territory, or until they shall have relieved themselves of that allegiance and have assumed their rights of American citizenship in conformity with the laws and Constitution of the country, and have brought themselves personally within its jurisdiction."

"Referring to Mr. Brulatour's dispatch No. 382, of the 1st of August last, in regard to the application of Mr. Eugene Albert Verdelet for a certificate or attestation from this Government that he, the applicant, has maintained his American nationality up to the present time, I have now to state that the question has been carefully considered. The material facts upon which the application is based appear to be that Verdelet *père*, the father of Eugene Albert, was born in France, resided in this country thirty-five years, and in 1853 became a citizen of the United States by naturalization. In 1859 he returned to his native country, and continued to reside there until his death, which occurred in 1874. In 1862 Eugene Albert, the present applicant, was born at Bordeaux,

France. He has always resided in France, has never been in the United States, and expresses no intention of ever coming here to reside, although, he says, property interests may render it necessary for him to visit the United States at some future time.

"A passport is the usual form in which this Government attests the nationality of citizens of the United States to a foreign Government. Under the circumstances of Mr. Verdelet's case it is considered that he is not entitled to a passport, and consequently that he cannot justly claim a certificate in any other form attesting the fact that he has maintained American nationality."

Mr. Frelinghuysen, Sec. of State, to Mr. Morton, Nov. 9, 1883. MSS. Inst., France; For. Rel., 1883. See *supra*, § 171.

"Your dispatch, No. 94, of the 6th ultimo, reports your action in regard to the application of Mr. Karl Klingenmeyer for a passport. While the Department concurs with you in thinking that a passport should be withheld for the present, at least so far as the issuance by your legation is concerned, because of the doubt raised as to the good faith of the applicant by the circumstance of his having already obtained a passport from your predecessor on the false pretense of birth in the United States of America, the views you hold as to the actual status of the party on the facts submitted seem to require some modification.

"The facts are briefly that Mr. Karl Klingenmeyer's father having been naturalized in the United States of America (but when or where does not appear), returned to Germany, where he resided in 1860 and until his death in 1881, without having evinced any intent to return to this country. Karl, the son, was born in Würtemberg in the year 1862; has not been in the United States; has no intention of residing here, but desires a certificate of American citizenship as a formality towards his intended marriage. This you refuse 'by reason of his father's renunciation of American citizenship (Article IV of the treaty of 1868), combined with his own German birth and free choice of German residence without intention of going to the United States.'

"It does not appear whether the father returned from America to Würtemberg, his native state, although the fact that the son was there born would seem to indicate that he did. This point, however, is not now of importance, and may be passed over.

"The precise date of the father's return to Germany in the year 1860 is not given, but it may be assumed that the son's birth on the 14th of February, 1862, occurred within the period of two years prescribed by the several naturalization treaties with North Germany.

"But that point also is unimportant, in view of the fact that under these treaties, a two years' residence in his native country of a citizen naturalized in the United States of America does not of itself divest him of his adopted citizenship. The treaties provide that when a citizen of

either country naturalized in the other shall renew his residence in the country of his birth without the intent to return to his adopted country, he shall be held to have renounced his naturalization, and further that the intent not to return '*may* be held to exist' after the residence in the native country shall exceed two years. The residence, therefore, is only evidence open to rebuttal of lack of intention to return to the adopted country. The treaty, therefore, by itself does not work forfeiture of citizenship, and in this case some affirmative governmental act was necessary to show that the elder Klingenmeyer had, through residence in Germany without intent to return here, forfeited his naturalization.

"This is the construction of the fourth article of the treaty of 1868 which has been maintained by this Department, and, so far as is known, admitted by the German Government. That the article does not of itself operate to make the returning individual a German subject is established by precedents on file in your legation.

"The party affected is in some instances required, after the expiration of the two years' residence, to affirmatively resume his previous allegiance, under the alternative of quitting the country, thus forcing him to elect between the two citizenships. Of course, if he quits the country he retains his adopted citizenship, unimpaired by the fact that he has exceeded the two years' limitation.

"If the father of Mr. Karl Klingenmeyer did in fact renounce his American citizenship and resume his original allegiance, in a manner recognized by the laws of his native country, that fact would operate as a renunciation of the adopted citizenship for his minor children, at least while they remain within the jurisdiction which their father re-acknowledged.

"The first point to be decided, then, is whether, as a fact, the father, during the son's minority, ceased to be an American citizen, and in deciding that the treaty clause should be construed as hereinbefore set forth. If the father did not so cease the case is plain, and the son is an American citizen, unless since reaching the age of twenty-one years he has himself forfeited his rights.

"We now reach a point less easy of decision, and that is, assuming that the father resumed German citizenship during the son's minority, what are the son's rights as against this Government upon reaching the age of twenty-one years, for there is no doubt that during minority his rights, if he had any other than those possessed by his father, were at least suspended and subject to the father's allegiance.

"The statute of the United States (Revised Statutes, section 1993) declares that all children born without the United States whose fathers 'were or may be at the time of their birth citizens thereof,' are themselves citizens of the United States, but that right 'shall not descend to children whose fathers never resided in the United States.'

"Therefore if Mr. Karl Klingenmeyer's father was at the time of his son's birth a citizen of this country, the son was such a citizen, while possibly by the German law (which I have not at hand) he might also be a citizen of the place of his birth. On general principles such conflicting citizenship is decided according to the laws of the one of the two countries claiming allegiance within whose jurisdiction the individual happens to be. (13 Op., 89.)

"The following facts may be considered as established in this case:

"(1) That the elder Klingenmeyer, the father of the present applicant, Mr. Karl Klingenmeyer, came to the United States of America and was naturalized here some time before the year 1860.

"(2) That the father returned to Germany some time in that year (1860) with the avowed intention of remaining permanently in that country, and of never returning to the United States of America with a view to residing permanently in this country.

"(3) That the elder Klingenmeyer adhered to the intention thus manifested by remaining in the country of his origin, and that of his primitive allegiance, for more than twenty years, and up to the time of his death in the year 1881. This must be taken in reason as well as in law to be a renunciation of his adopted citizenship. No matter to what country he may have gone, there can be no stronger, no clearer manifestation of intent against the *animus revertendi* than a man's own declaration followed by the establishment of a permanent domicil in the new country of his choice, and the entry into business there, and remaining in that newly-chosen country until his death, over twenty-one years later. It is also a resumption of his original nationality and native allegiance. That is a question in regard to which either the United States or Germany may insist upon its own view of, as it may be held respectively by either Government.

"It is not materially essential to the determination of the present question, but as is stated by Attorney-General Hoar in the case cited above (13 Op., 90), is usually determined by the country, claiming affirmatively, when the man is found within that jurisdiction.

"(4) That Mr. Karl Klingenmeyer was born in Würtemberg, Germany, on the 14th day of February, 1862, which event was after the date of the father's return to Germany and his father's renunciation of his acquired United States citizenship.

"(5) That Mr. Karl Klingenmeyer never resided in the United States; in fact never was in this country.

"(6) That he now publicly disclaims any intention of ever coming to the United States to reside; and also, in any equally public manner avows his intention of permanently residing in Germany, adding that he desires an American passport solely for the purpose of facilitating his matrimonial plans and arrangements.

"Now, suppose that this young man had obtained through his father's acquired American nationality any inchoate rights or claim to United

States citizenship, and that these, on account of his father's voluntary foreign residence, and his loss of American citizenship, were held in abeyance during the son Karl's residence with his father there, reserving to him, Karl Klingenmeyer, the right of choosing for himself, when he should have attained the age of twenty-one years, which country he would adhere to. This reserved privilege in his favor is always accompanied by the implied condition that he shall make and in some formal manner, not always prescribed, but nevertheless well understood, avow his election within a reasonable time after he attains majority.

"Applying these just and reasonable requirements to the case of Mr. Karl Klingenmeyer, how has he fulfilled them? He is now nearly twenty-three years old; he had not, until the filing of his application for a United States passport, even so much as claimed American citizenship, and he does so now, accompanied by the open avowal that he never intends to make the United States his home, his residence, or his country, except to demand technical citizenship in so far as that may serve his convenience and subserve his personal interest. He neither bears nor acknowledges any obligation to share with the American citizens any of the burdens incident to the character of citizenship in this country. It is not known that he has ever paid any taxes in the United States; indeed, there is every reason to believe that he has not. It is known that he has never performed any public service, civil or military, in or for the United States; and it is also known that he is not within the call of the United States should his services be at any time in the future needed in the nation's defense. Indeed, it may be assumed from his declarations and acts that if at any future time the United States and Germany should be at war, Mr. Karl Klingenmeyer would be found fighting under the German flag and against the United States, whose protection he is now claiming. Neither reason, justice, nor public law countenances any such anomalous condition of nationality, so that without deciding the possible judicial question of two years' residence in the country of origin, which is involved in the fourth article of the treaty of February, 1868, it may well be held that Mr. Karl Klingenmeyer is not on his present application entitled to a United States passport, and your refusal to comply with his request in that behalf is therefore approved by the Department.

"I have, however, deemed it most expedient to place the refusal on the ground indicated in this instruction, leaving the question of the interpretation of the two years' clause in Article IV of the treaty of 1868 open to the decision of the Supreme Court of the United States, when the question in proper form may be brought before that tribunal. You may possibly find some of these suggestions of value in future cases of a similar character that may come before you."

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, Jan. 15, 1885. MSS. Inst., Germ.; For. Rel., 1885.

"I have received Mr. Young's dispatch No. 658, dated the 23d February, with inclosure, informing the Department that he had instructed the consul at Canton to recognize the right of John Frederick Pearson to American citizenship, and have given it my careful attention. * *

"I inclose you an opinion on the question by the law officer of the Department by which you will see that inasmuch as Pearson's father was an American citizen, the nationality of his mother previous to marriage would make no difference in the son's nationality, provided he was legitimate, unless the father was a citizen of a State which prohibits marriage with Chinese, of which there is no allegation in the present instance."

Mr. Bayard, Sec. of State, to Mr. Smithers, May 4, 1885. MSS. Inst., China; For. Rel., 1885.

The citizenship of a child may be divested by his return with his parents to their country of origin, and his subsequent election, when of full age, of citizenship in such country.

See Mr. Porter, Acting Sec. of State, to Mr. Jesurun, June 16, 1886. MSS. Dom. Let. See App., vol. iii, § 185.

"It is an established principle of international law that a child born abroad to a citizen of the United States partakes of his father's nationality, subject, however, to the divesting of this nationality by his election, when he arrives at full age, to accept allegiance to the country of his birth. This right cannot be taken from him either by municipal legislation or by treaty enactments to which the country of his inherited allegiance is not a party. * * *

"It is also a principle of international law that allegiance can be divested by naturalization in a foreign land, and that this prerogative cannot be divested by the municipal legislation of any particular country, to which legislation the naturalizing country is not a party. * * *

"Under the rules of international law, the son, having been born in Alsace-Lorraine of an American father, had the option of remaining there until his majority and electing to take the allegiance of his birth, or of claiming the allegiance of his father. It appears, however, that he did not remain in Alsace until he attained his majority. He came to the United States during his minority, and when he arrived at his majority, evinced his election of American citizenship by exercising the rights which pertain thereto, and by other acts indicating the same election. Under these circumstances his subsequent taking out of naturalization papers is to be regarded merely as cumulative evidence of his election to take the United States as the country of his allegiance. He was already a citizen of the United States and was none the less so because he may have entertained unfounded doubts on the subject, as from his conduct would appear to have been the case."

Mr. Bayard, Sec. of State, to Mr. Pendleton, Apr. 27, 1886. MSS. Inst. Germ.; For. Rel. 1886.

As to passports in such cases, see *infra*, § 192.

Persons born in the colonies, before the Declaration of Independence had a right to elect whether they would retain their native allegiance to the British Crown, or would become citizens of one of the several States. The rule as to the point of time at which Americans, born before the Declaration of Independence, ceased to be British subjects, differed in England and in the United States; England taking the treaty of peace in 1783; the United States, the date of the declaration. It was not necessary that the election should have been manifested by any act prior to, or on or about, the 4th of July, 1776. Persons remaining here after that day were, *prima facie*, to be deemed American citizens, but this presumption was subject to rebuttal by showing adhesion to the British Crown during the struggle.

Inglis *v.* Trustees, &c., 3 Pet., 99.

Where a person, born in Texas when it was a part of the Republic of Mexico, the place of birth being also the domicile of her father and mother until their deaths, was removed to Mexico at the age of four years, before the declaration of Texan independence, and there remained, it was held, that she was an alien, and could sue in the courts of the United States.

Jones *v.* McMasters, 20 How., 8.

A person born on board of an United States vessel, of parents who are citizens of the United States, but who are, at the time, in a foreign country, not with the design of removing thither, but only having touched there in the course of a voyage which the father has made as captain of the vessel, is to be regarded as a citizen of the United States.

U. S. *v.* Gordon, 5 Blatch., 18.

Children born abroad, whose fathers at the time of said children's birth, were citizens of the United States, are citizens of the United States by the act of February 10, 1855. But if, by the laws of the country in which they were born and reside, they are citizens of that country, the United States cannot exempt them from the allegiance which they owe to the country of their birth while they continue within its territory, and will not issue passports to them in that country as citizens of the United States.

13 Op., 89, Hoar, 1869.

Children born abroad of persons once citizens of the United States, but who have become citizens or subjects of a foreign power, are not citizens of the United States, nor entitled to protection as such.

14 Op., 295, Williams, 1873.

VI. *MARRIED WOMEN.*

A MARRIED WOMAN PARTAKES OF HER HUSBAND'S NATIONALITY.

§ 186.

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

Rev. Stat., § 1994, formerly act of Feb. 10, 1855, chap. 71, § 2; 10 Stat. L., 604. See also act of Mar. 26, 1804, 2 Stat. L., 292, as to widow and children of alien who has declared his intention.

"Inasmuch as the subject of naturalization is within the exclusive jurisdiction of Congress, there would seem to be little question that such a marriage (one in conformity with the act of June 23, 1860) would be effectual for the purpose of naturalizing an alien female married to a citizen of the United States."

Mr. Fish, Sec. of State, to Mr. Bancroft, June 7, 1870. MSS. Inst., Prussia.

By the law of England and the United States an alien woman, on her marriage with a subject or citizen, merges her nationality in that of her husband. "But the converse has never been established as the law of the United States, and only by the act of Parliament of May 12, 1870, did it become British law that an English woman lost her quality of a British subject by marrying an alien, The continental codes, on the other hand, enable a woman whose nationality of origin has been changed by marriage to resume it when she becomes a widow, on the condition, however, of her returning to the country of her origin. The widow to whom you refer may, as a matter of strict law, remain a citizen, but as a citizen has no absolute right to a passport, and as the law of the United States has outside of their jurisdiction only such force as foreign nations may choose to accord it in their own territory, I think it judicious to withhold passports in such cases unless the widow gives evidence of her intention to resume her residence in the United States."

Mr. Fish, Sec. of State, to Mr. Washburne, Feb. 24, 1871. MSS. Inst., France.

"I have your dispatch No. 68, respecting the case of Mrs. Gordon, formerly Topaz, a Russian woman of the Hebrew faith, who has lately married an American citizen. It is understood that by the laws of Russia she could not while a subject of Russia remain in the Empire without renouncing her faith and accepting Christianity. You wish to know whether by her marriage to an American such a person, under the statutes of the United States and the 1st article of the treaty of 1832 with Russia, acquires the right to be exempt from the operation of the municipal laws of Russia.

"The statute of the United States regulating the status of alien women married to American citizens was approved on the 10th of February, 1855 (10 Stat. L., 604). By this statute it is enacted 'that any woman who might lawfully be naturalized under the existing laws, mar-

ried or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.'

"The Attorney-General of the United States in construing this statute has held 'that irrespective of the time or place of marriage, or the residence of the parties, any free white woman, not an alien enemy, married to a citizen of this country, is to be taken and deemed a citizen of the United States.'

"There can therefore be no doubt that such a person would, upon her marriage to an American citizen, acquire the right to be regarded by the authorities of the United States as an American citizen in every country except that to which she owed allegiance at the time of her marriage.

"It is understood at the Department that the laws of Russia regard a Russian subject marrying a foreign subject as a foreigner. In such case no conflict of law could arise, because the Russian Government would concede the full American citizenship of the married woman.

"But should it be otherwise, her relations to that Government would be affected by another opinion of the Attorney-General (given by Attorney-General Hoar), that while the United States may by law fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or Government, it ought not, by undertaking to confer the rights of citizenship upon the subject of a foreign nation, who had not come within our territory, to interfere with the just rights of such nation to the government and control of its own subjects."

Mr. Fish, Sec. of State, to Mr. Jewell, June 9, 1874. MSS. Inst., Russia.

A woman partakes of her husband's nationality.

Mr. Fish, Sec. of State, to Mr. Perez, Mar. 18, 1872. MSS. Notes, Nicaragua. Mr. Fish to Mrs. Negrete, Oct. 28, 1874. MSS. Dom. Let.

A woman who is a citizen of the United States merges her nationality in that of a foreign husband on her marriage; but it does not necessarily follow that she thus becomes subject to all the disabilities of alienage, such as inability to inherit or transfer real property.

Mr. Fish, Sec. of State, to Mr. Williamson, Sept. 22, 1875. MSS. Inst., Costa Rica.

A wife's political status follows that of her husband.

Mr. Frelinghuysen, Sec. of State, to Mr. Lawrence, Mar. 31, 1883. MSS. Dom. Let. Mr. Frelinghuysen, Sec. of State, to Mr. Foster, Apr. 2, 1883; *ibid.*

A wife's nationality and domicile, for business purposes, follows that of her husband.

Mr. Frelinghuysen, Sec. of State, to Mrs. Walsh, Jan. 31, 1884. MSS. Dom. Let. As to passports in such cases, see *infra*, § 192.

A woman who was born in South Carolina and resided with her father, a citizen of that State, in Charleston, at the time of the Declaration of Independence and afterwards, till 1781, when she was married to a British officer, with whom she went to England in 1782, where she remained till her death in 1801, was held to be an alien. The opinion of the court was not that she ceased to be a citizen simply by her marriage to an alien, but that her withdrawal with her husband, and her permanent adherence to the side of the enemies of the State down to and at the time of the treaty of peace (1783), operated as a virtual dissolution of her allegiance by an election which her coverture did not prevent her from making.

Shanks *v.* Dupont, 3 Pet., 242.

The domicil of a widow is presumed to be that of her deceased husband, unless she has exercised her right to change it.

Pennsylvania *v.* Ravenel, 21 How., 103.

Where a woman is divorced a *mensa et thoro*, her domicil is not affected by the removal of her husband to another country.

Barber *v.* Barber, 21 How., 582.

Under section 1994, Revised Statutes, as well as by international law, a woman who is married to a citizen of the United States partakes of his citizenship, whenever acquired, though residing abroad.

Kelly *v.* Owen, 7 Wall., 496; Leonard *v.* Grant, 5 Fed. Rep., 11, 6 Sawyer, 603; U. S. *v.* Kellar, 11 Biss., 314; 14 Op., 402.

A woman of foreign birth, naturalized in this country by her marriage with a citizen of the United States, resumes her alienage by her marriage with a subject of her native country.

Pequinot *v.* Detroit, 16 Fed. Rep., 211.

The residence of a citizen of the United States, with her husband, in a foreign country, of which he is a subject, does not *per se* expatriate either her or a daughter, by said husband, born before her removal from the United States.

10 Op., 321, Bates, 1862.

A woman was born, married a French citizen, and always resided, before and after the death of her husband, in France. It was held that she was a French subject, though her father, at the time of her birth, was a citizen of the United States.

12 Op., 7, Stanbery, 1866.

A woman, born in the United States, who marries a citizen of France, when she becomes domiciled there loses her citizenship of origin, so far

as concerns the question of liability to taxation under the one hundred and sixteenth section of the act of June 30, 1864.

13 Op., 128, Hoar, 1869; citing an opinion of Mr. Stanbery, Attorney-General, to same effect.

Judge Hoar, in his opinion, says that he reserves the question whether "a woman who is a citizen of the United States, and has become by marriage a citizen of France, is not after such a marriage a citizen of the United States in a qualified sense."

Under section 2 of the act of February 10, 1855, any free white woman, not an alien enemy, married to a citizen of the United States, is to be taken and deemed a citizen also, irrespective of the time or place of marriage or the residence of the parties.

14 Op., 402, Williams, 1874.

The citizenship acquired by an alien woman, through marriage to a citizen of the United States, is not lost by the death of her husband; nor does the mere fact of her subsequent marriage to an alien divest her of the citizenship so acquired.

15 Op., 599, Phillips, 1877.

"In 1862, it was decided by the British Government, in the case of American born widows of British subjects, that if the American law was at variance with their own (conferring upon the wives of British subjects the privileges of natural-born British subjects), and the United States desired to put the American law in force, the American law must prevail, and American born widows being resident in America would not be entitled to a certificate of being British subjects. The British Government further decided in the case of British-born subjects, the widows of American or foreign husbands, that if after the dissolution of their coverture they should elect to claim the benefit of their British character, they would be at liberty to do so, and must be treated and protected as British subjects (Parl. Pap. No. 189)."

1 Halleck's Int. Law (Baker's ed.), 369.

VII. *TERRITORIAL CHANGE.*

(1) Allegiance follows.

§ 187.

On this subject see *supra*, §§ 3 *ff.*

By an act of the 4th of October, 1776, the State of New Jersey asserted its right to the allegiance of all persons born and then residing within the territory of the State. Therefore, one who was born there, and continued to reside there till 1777, was a citizen of the State; and his leaving the State afterwards, and actually adhering to the side of the Crown did not render him an alien, nor did the treaty of peace of 1783 have that effect.

McIlvaine *v.* Coxe's Lessee, 4 Cranch, 209.

But it has been held that a resident of New York, who, independently of any act of the legislature of the State which might affect his status, had elected to be an alien, was not made a citizen of the State by the resolution of the convention of New York of the 16th of July, 1776, "that all persons abiding within the State of New York, and desiring protection from the laws of the same, owe allegiance to the said laws, and are members of the State"; he being then within the British lines, and under the protection of the British army, manifesting a full determination to continue a British subject. But if he had ever owed any allegiance to the State, it was held that he would have been released from it by a subsequent bill of attainder by which he was declared to be forever banished from the State, and adjudged guilty of treason should he be found there.

Inglis *v.* Trustees, &c., 3 Pet., 99.

"The American States [during the Revolutionary war] insisted upon the allegiance of all born within the States respectively, and Great Britain asserted an equally exclusive claim. The treaty of peace of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American States were virtually absolved from all allegiance to the British Crown. All those who then adhered to the British Crown were deemed and held subjects of that Crown. The treaty of peace was a treaty operating between the States on each side and the inhabitants thereof. In the language of the seventh article, it was a firm and perpetual peace between His Britannic Majesty and the said States, 'and between the subjects of the one and the citizens of the other.' Who were then subjects or citizens was to be decided by the state of facts. If they were originally subjects of Great Britain, and then adhered to her, and were claimed by her as subjects, the treaty deemed them such. If they were originally British subjects, but then adhering to the States, the treaty deemed them citizens. Such, I think, is the natural, and, indeed, almost necessary meaning of the treaty; it would otherwise follow that there would continue a double allegiance of many persons, an inconvenience which must have been foreseen, and would cause the most injurious effects to both nations. * * * It does not appear to us that her situation as a *feme covert* disabled her from a change of allegiance. British *femes covert*, residing here with their husbands at the time of our independence, and adhering to our side until the close of the war, have been always supposed to have become thereby American citizens and to have been absolved from their antecedent British allegiance. The incapacities of *femes covert*, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. The political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary

transactions, but stand upon the more general principles of the law of nations. The case of Martin *v.* The Commonwealth, 1 Mass., 347, turned upon very different considerations. There the question was, whether a *feme covert* should be deemed to have forfeited her estate for an offense committed with her husband, by withdrawing from the State, &c., under the confiscation act of 1779; and it was held that she was not within the purview of the act. The same remark disposes of the case of Sewall *v.* Lee, 9 Mass., 363, where the court expressly refused to decide whether the wife, by her withdrawal with her husband, became an alien. But in Kelly *v.* Harrison, 2 Johns., 29, the reasoning of the court proceeds upon the assumption that the wife might have acquired the same citizenship with her husband, by withdrawing with him from the British dominions. See also Bac. Abridg. Alien, A; Cro. Car., 601, 602; 4 Term. Rep., 300; Brook's Abr. Denizen, 21; Jackson *v.* Lunn, 3 Johns., 109."

Story, J.; Shanks *v.* Dupont, 3 Pet., 247, 248; *infra*, § 188.

Where, after a conquest, a treaty provided that those of the inhabitants who wished to adhere in allegiance to their vanquished sovereign, might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

U. S. *v.* Repentigny, 5 Wall., 211. See *supra*, §§ 5 *ff.*

On a transfer of territory by one nation to another the political relations between the inhabitants of the ceded territory and the former Government are changed, and new ones arise between them and the new Government.

Tobin *v.* Walkinshaw, McAll., 186; *infra*, § 188.

Alaska is not "Indian country," as the term is used in the intercourse act of 1834 and in the Revised Statutes. "Who are citizens of the United States in Alaska under article 3 of the treaty of 1867 may be a difficult question to determine. The treaty furnishes the law, but the difficulty, if any, will arise in the application of it. Under the treaty the inhabitants of Alaska at that date who did not return to Russia within three years thereafter became citizens of the United States, excepting members of the uncivilized tribes. The word 'white' in the second clause is no longer regarded as the law of the state, and is expressly displaced, so far as the courts of the United States are concerned, by the proviso to section 2 of the act of 1879, *supra*. The words 'county in which he is returned,' in the same clause, must be held inapplicable to Alaska, where there are no counties, and their place supplied by the word 'district.'"

Deady, J.; Kie *v.* U. S., 27 Fed. Rep., 351 (1886). See *supra*, § 159.

Annexation, as is noticed by Calvo (droit int., 3d ed., vol. 2, 80), does not necessarily imply naturalization of the annexed population. When Hanover was attached to Great Britain in 1714 by the accession of the

house of Hanover to the British throne there was no fusion of the nationalities by which a member of one became a member of the other; and the same incidents accompanied the reunion of Norway and Sweden in 1814, and the temporary absorption of Italy in France under the first Napoleon. Ordinarily a treaty of cession and annexation gives to the citizens of the annexed country the position of citizens of the country annexing. Thus by the third article of the convention with France of 1803 for the purchase of Louisiana, it is stipulated that the inhabitants of the ceded territory shall be incorporated in the United States, and admitted to the enjoyment, as soon as is practicable, of the privileges of citizens of the United States. A similar provision is found in the sixth article of the treaty with Spain for the purchase of Florida. By the resolution of Congress of March 1, 1845, annexing Texas, citizens of Texas, by its becoming a State of the Union, became citizens of the United States. (See *supra*, §§ 4 *ff.*)

(2) NATURALIZATION BY REVOLUTION OR TREATY.

§ 188.

See, on this topic, *supra*, §§ 3 *ff.* That subjection is due to a *de facto* Government, see *supra*, § 7.

"Foreigners who, during the existence of the Articles of Confederation, became inhabitants, or, taking the expression in its most limited sense, were admitted citizens of any State, became thereby entitled to the privileges of citizens in the several States, and were, to all intents and purposes, citizens of the United States at the time of the adoption of the Constitution of the United States. The contrary opinion would lead to the extraordinary conclusion that the several thousand foreigners naturalized under the laws of the States prior to the adoption of the Constitution of the United States, not being then deemed citizens of the United States, would be forever ineligible, whilst those naturalized under the acts of Congress subsequent to the adoption of the Constitution would, as citizens of the United States, become eligible to either house of Congress."

Mr. Gallatin to Mr. Lowrio, Feb. 19, 1824. 2 Gallatin's Writings, 287.

An infant who was born in America before the Declaration of Independence and resided in New York with his father, a British partisan, during the subsequent conflict, and went with him to England shortly before the evacuation of the city by the British in November, 1783, and never returned, must be deemed to have followed the condition of his father and to have adhered to the Crown.

Inglis *v.* Trustees, &c., 3 Pet., 99.

"But it is insisted that the treaty of peace operating upon his condition at that time, or afterwards, he became an alien to the State of New Jersey in consequence of his election then made to become a subject of the King, and his subsequent conduct confirming that election. In vain have we searched that instrument for some clause or expression which, by any implication, could work this effect. It contains an acknowledgment of the independence and sovereignty of the United

States in their political capacities, and a relinquishment on the part of His Britannic Majesty of all claim to the government, proprietary, and territorial rights of the same. These concessions amounted, no doubt, to a formal renunciation of all claim to the allegiance of the citizens of the United States. But the question who were at that period citizens of the United States is not decided, or in the slightest degree alluded to, in this instrument; it was left necessarily to depend upon the laws of the respective States, who, in their sovereign capacities, had acted authoritatively upon the subject. It left all such persons in the situations it found them, neither making those citizens who had, by the laws of any of the States, been declared aliens, nor releasing from their allegiance any who had become, or were claimed as, citizens. It repeals no laws of any of the States which were then in force and operating upon this subject, but, on the contrary, it recognizes their validity by stipulating that Congress should recommend to the States the reconsideration of such of them as had worked confiscations. If the laws relating to this subject were, at that period, in the language of one of the counsel, temporary and *functi officio*, they certainly were not rendered so by the terms of the treaty nor by the political situation of the two nations, in consequence of it. A contrary doctrine is not only inconsistent with the sovereignties of the States, anterior to and independent of the treaty, but its indiscriminate adoption might be productive of more mischief than it is possible for us to foresee.

"If, then, at the period of the treaty, the laws of New Jersey, which had made Daniel Coxe a subject of that State, were in full force, and were not repealed or in any manner affected by that instrument; if by force of these laws he was incapable of throwing off his allegiance to the State and derived no right to do so by virtue of the treaty, it follows that he still retains the capacity, which he possessed before the treaty, to take lands by descent in New Jersey, and, consequently, that the lessor of the plaintiff is entitled to recover."

Cushing, J.; McIlvaine *v.* Coxe, 4 Cranch, 214, 215.

"With reference to persons born before the Revolution it has been held: That one born in and always a resident of Great Britain was an alien (Dawson *v.* Godfrey, 4 Cranch, 321; Fairfax *v.* Hunter, 7 *ibid*, 603; Blight *v.* Rochester, 7 Wheat., 535; Contee *v.* Godfrey, 1 Cranch C. Ct., 479); that one born here, but who left the country before the Declaration of Independence, and did not return (until after the treaty) became an alien (Inglis *v.* The Sailor's Snug Harbor, 3 Pet., 99; Hollingsworth *v.* Duane, Wall. C. Ct., 51); also, that a person born in New Jersey before the year 1775, and residing there until the year 1777, although then joining the British army, and ever afterwards claiming to be a British subject, was not an alien, but a citizen (McIlvaine *v.* Coxe, 4 Cranch, 209; and see explanations in Inglis *v.* Trustees, &c., 3 Pet., 99)."

Summary in Abb. Nat. Dig., tit. Alien.

"It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North

America, whilst subject to the Crown of Great Britain, were natural-born British subjects, and it must necessarily follow that that character was changed by the separation of the colonies from the parent state, and the acknowledgment of their independence.

"The rule as to the point of time at which the American *ante nati* ceased to be British subjects, differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace in 1783; our rule is to take the date of the Declaration of Independence; and in the application of the rule to different cases some difference in opinion may arise. The settled doctrine of this country is that a person born here, who left the country before the Declaration of Independence, and never returned here, became thereby an alien, and incapable of taking lands subsequently by descent in this country. The right to inherit depends upon the existing state of allegiance at the time of descent cast. The descent cast being in this case long after the treaty of peace, the difficulty which has arisen in some cases where the title was acquired between the Declaration of Independence and the treaty of peace, does not arise here. *Prima facie*, and as a general rule, the character in which the American *ante nati* are to be considered, will depend upon and be determined by the situation of the party and the election made at the date of the Declaration of Independence according to our rule, or the treaty of peace according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases. And if the right of election is at all admitted, it must be determined, in most cases, by what took place during the struggle, and between the Declaration of Independence and the treaty of peace. To say that the election must have been made before or immediately at the Declaration of Independence, would render the right nugatory.

"The doctrine of perpetual allegiance is not applied by the British courts to the American *ante nati*. This is fully shown by the late case of Doe *v.* Acklain, 2 Barn. & Cresw., 779. Chief-Justice Abbott says: 'James Ludlow, the father of Frances May, the lessor of the plaintiff, was undoubtedly born a subject of Great Britain. He was born in a part of America which was at the time of his birth a British colony, and parcel of the dominions of the Crown of Great Britain; but, upon the fact found, we are of opinion that he was not a subject of the Crown of Great Britain at the time of the birth of his daughter. She was born after the independence of the colonies was recognized by the Crown of Great Britain, after the colonies had become United States, and their inhabitants generally citizens of those States. And her father, by his continued residence in those States, manifestly became a citizen of them.' He considered the treaty of peace as a release from their allegiance of all British subjects who remained there. A declaration, says he, that a state shall be free, sovereign, and independent, is a declara-

tion that the people composing the state shall no longer be considered as subjects of the sovereign by whom such a declaration is made. And this court, in the case of Blight's Lessee *v.* Rochester, 7 Wheat., 544, adopted the same rule with respect to the right of British subjects here: That although born before the Revolution they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country. The British doctrine, therefore, is that the American *ante nati*, by remaining in America after the treaty of peace, lost their character of British subjects. And our doctrine is, that by withdrawing from this country and adhering to the British Government, they lost, or, perhaps more properly speaking, never acquired, the character of American citizens.

"This right of election must necessarily exist in all revolutions like ours, and is so well established by adjudged cases that it is entirely unnecessary to enter into an examination of the authorities. The only difficulty that can arise is to determine the time when the election should have been made. (Vattel, b. 1, c. 3, § 33; 1 Dall., 58; 2 Dall., 234; 20 Johns., 332; 2 Mass., 179, 236, 244, n.; 2 Pickering, 394; 2 Kent's Com., 49.)

"I am not aware of any case in the American courts where this right of election has been denied, except that of Ainsley *v.* Martin (9 Mass., 454). Chief-Justice Parsons does there seem to recognize and apply the doctrine of perpetual allegiance in its fullest extent. He there declares that a person born in Massachusetts, and who, before the 4th of July, 1776, withdrew into the British dominions and never since returned into the United States was not an alien; that his allegiance to the King of Great Britain was founded on his birth within his dominions, and that that allegiance accrued to the Commonwealth of Massachusetts as his lawful successor. But he adds what may take the present case even out of his rule: 'It not being alleged' says he, 'that the demandant has been expatriated by virtue of any statute or any judgment of law.' But the doctrine laid down in this case is certainly not that which prevailed in the supreme judicial court of Massachusetts both before and since that decision, as will appear by the cases above referred to of Gardner *v.* Ward, 2 Mass., 244, n., and Kilham *v.* Ward, 2 Mass., 236, and of George Phipps, 2 Pickering, 394, n.

"John Inglis, if born before the Declaration of Independence, must have been very young at that time and incapable of making an election for himself; but he must, after such a lapse of time, be taken to have adopted and ratified the choice made for him by his father, and still to retain the character of a British subject and never to have become an American citizen, if his father was so to be considered. He was taken from this country by his father before the treaty of peace, and has continued ever since to reside within the British dominions without signifying any dissent to the election made for him, and this ratification as

to all his rights must relate back and have the same effect and operation as if the election had been made by himself at that time.

"How, then, is his father, Charles Inglis, to be considered? Was he an American citizen? He was here at the time of the Declaration of Independence, and *prima facie* may be deemed to have become thereby an American citizen. But this *prima facie* presumption may be rebutted, otherwise there is no force or meaning in the right of election. * * *

"The case of McIlvaine *v.* Coxe's Lessee, 4 C., 211, which has been relied upon, will not reach this case. The court in that case recognized fully the right of election, but considered that Mr. Coxe had lost that right by remaining in the State of New Jersey, not only after she had declared herself a sovereign State, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to, the new Government; that by the act of the 4th of October, 1776, he became a member of the new society, entitled to the protection of its Government. * * *

"It cannot, I presume, be denied, but that allegiance may be dissolved by the mutual consent of the Government and its citizens or subjects. The Government may release the governed from their allegiance."

Thompson, J.; Inglis *v.* Trustees, &c., 3 Pet., 120 *ff.*

The capture of Charleston, S. C. by the British forces in May, 1780, did not permanently change the allegiance or the national character of the inhabitants.

Shank *v.* Dupont, 3 Pet. 242.

All British subjects, as well those who residing in the States at the time of the Declaration of Independence elected at or before the time of the treaty of peace in 1783 to remain subject to the crown, as others, were protected by the treaty of 1794 in their possession of lands in the United States.

Ibid.

Under the constitution of Texas of 1826, which identified as citizens only those who resided there on the day of the declaration of independence, or should be naturalized, and provided that no alien should hold land in Texas except by titles emanating from the Government, and the act of 1840 adopting the common law of England, one who removed from Texas to Mexico during the revolution and before the declaration of independence, and remained in Mexico, is an alien, and cannot inherit in Texas.

McKinney *v.* Saviego, 18 How., 235.

A person born in Texas and removing therefrom before the separation from Mexico remains a citizen of Mexico, though a minor when the separation took place.

Jones *v.* McMasters, 20 How., 8.

On the conquest of one nation by another, and the subsequent surrender of the soil and change of sovereignty, those of the inhabitants who do not remain and become citizens of the victorious sovereign, but, on the contrary, adhere to their old allegiance, and continue in the service of the vanquished sovereign, deprive themselves of protection or security to their property, except so far as it may be secured by treaty.

U. S. *v.* Repentigny, 5 Wall., 211.

After delivery the relations of the inhabitants of ceded territory to their former sovereign are dissolved, but not their relations to each other.

U. S. *v.* Repentigny, 5 Wall., 211. *Supra*, §§ 3 *ff.*

A transfer of territory from one nation to another transfers the allegiance of those who remain in it (1 Pet., 542); but this applies directly only to the natural-born citizens. The contracting parties have the right to contract to transfer and to receive, respectively, the allegiance of all native-born citizens; but the naturalized citizens, who owe allegiance purely statutory, when released therefrom, are remitted to their original status.

Tobin *v.* Walkinshaw, McAll., 186. *Supra*, §§ 3 *ff.*

By article 3 of the convention with Great Britain of 1818, it was agreed that the Oregon Territory should "be free and open to the vessels, citizens, and subjects of the two powers," which convention was continued in force until the convention of 1846. It was held, in reference to a question of nationality, that during the period of such joint occupation the country, as to British subjects therein, was British soil, and subject to the jurisdiction of the King of Great Britain; but as to citizens of the United States it was American soil, and subject to the jurisdiction of the United States.

McKay *v.* Campbell, 2 Sawyer, 119. *Supra*, §§ 171 *ff.*

A person born in 1823 at Fort George, Oregon Territory, of a British father and an Indian mother, was held to be born either a British subjects or an Indian, but not in any aspect a citizen of the United States.

McKay *v.* Campbell, 2 Sawyer, 118; 5 Am. L. T. *Infra*, § 106; *supra*, §§ 173 *ff.*

All persons who were citizens of Texas at the date of annexation, viz, December 29, 1845, became citizens of the United States by virtue of the collective naturalization effected by the act of that date.

13 Op., 397, Akerman, 1871. See *supra*, § 5.

As to annexation of Texas, see *supra*, §§ 58, 72, 154.

VIII. *PROTECTION OF GOVERNMENT.*

(1) GRANTED TO CITIZENS ABROAD.

§ 189.

On this subject see *infra*, chap. ix, where claims on foreign Governments for injuries to citizens are discussed.
As to inquiries from foreign Governments, see App., vol. iii, § 189.

"Summary, sanguine, or undue punishment" of citizens of the United States charged with political offences in Mexico will be the subject of grave expostulation with the Mexican Government.

Mr. Webster. Sec. of State, to Mr. Ellis, Jan. 3. 1842. MSS. Inst., Mex. *Ibid.*, Feb. 26, 1842. *Infra*, § 230.

"Citzens of the United State whilst residiug in Peru are subject to its laws and the treaties existing between the parties, and are amenable to its courts of justice for any crimes or offenses which they may commit. It is the province of the judiciary to construe and administer the laws; and if this be done promptly and impartially towards American citizens, and with a just regard to their rights, they have no cause of complaint. In such cases they have no right to appeal for redress to the diplomatic representative of their country, nor ought he to regard their complaints. It is only where justice has been denied or unreasonably delayed by the courts of justice of foreign countries, where these are used as instruments to oppress American citizens or deprive them of their just rights, that they are warranted in appealing to their Government to interpose. No such circumstances exist, so far as I understand the question, in the case of Dr. Norris, which was the subject of Mr. Jewett's protest."

Mr. Buchanan, Sec. of State, to Mr. Osma, Feb. 1, 1848. MSS. Notes, Peru.

In the British and Foreign State Papers for 1852–'53, vol. 42, 412, is given, under title of correspondence between the United States and Great Britain respecting the imprisonment of Messrs. Berger and Ryan for treasonable practices in Ireland, a note from Lord Palmerston to Mr. Bancroft, September 20, 1848, stating, among other things, that "if there be any citizens of the United States who have chosen this period of disturbance for visiting Ireland, for innocent purposes, they must not be surprised if, like persons whom curiosity may lead into the midst of a battle, they should be involved into the sweep of measures aimed at men of a different description. But Her Majesty's Government will always lament that mistakes of this kind should happen by which unoffending travelers may be exposed to inconvenience, and the utmost alacrity will at all times be evinced by the Irish Government to rectify such errors."

As to intervention in such cases, see *supra*, § 52; *infra*, § 230.

The discrimination against persons of Irish birth returning to Ireland from America, by which such persons are subjected to peculiar scrutiny

and search, is an offense to the United States requiring the most decisive protest.

Mr. Buchanan, Sec. of State, to Mr. Bancroft, Dec. 18, 1848. MSS. Inst., Gr. Brit.

President Polk's message of December 28, 1848, transmitting a report of the Secretary of State, and accompanying papers, in relation to the imprisonment of American citizens in Ireland, is given in House Ex. Doc. 19, 30th Cong., 2d sess.

Arbitrary and capricious action on the part of the governor-general of Cuba in excluding from Cuba citizens of the United States will be ground for diplomatic interposition, and so of arbitrary and capricious exclusion from port of merchant vessels of the United States.

Mr. Everett, Sec. of State, to Mr. Barringer, Feb. 4, 1853; Mr. Marcy to Mr. Barringer, Apr. 19, 1853. MSS. Inst., Spain.

And so of arbitrary seizures of United States packet steamers on charge of breach of custom-house regulations.

Mr. Marcy, Sec. of State, to Mr. Soulé, Mar. 11, 1854; Mar. 17, 1854; June 22, 1854; Aug. 16, 1854; *ibid.*

For Black Warrior case see *supra*, § 90.

"Every nation, whenever its laws are violated by any one owing obedience to them, whether he be a citizen or a stranger, has a right to inflict the penalties incurred upon the transgressor if found within its jurisdiction. The case is not altered by the character of the laws, unless they are in derogation of the well-established international code. No nation has a right to supervise the municipal code of another nation or claim that its citizens or subjects shall be exempted from the operation of such code, if they have voluntarily placed themselves under it. The character of the municipal laws of one country does not furnish a just ground for other states to interfere with the execution of these laws even upon their own citizens when they have gone into that country and subjected themselves to its jurisdiction. If this country can rightfully claim no such exemption for its native-born or naturalized citizens, it cannot claim it for those who have at most but inchoate rights of citizens.

"The above principle, that persons, being citizens or subjects of one state and having violated the laws of another state, may be punished while they remain under or are fairly brought within the jurisdiction of the latter state, is too well established to be made a matter of serious controversy. It is clearly affirmed in, and, indeed, is the basis of, every extradition treaty. Each contracting party agrees to deliver up to the other fugitive offenders,—generally including its own citizens as well as strangers,—for specified offenses, to be dealt with according to the laws of the country demanding the surrender of them. It is true that there are some kinds of offenses which are not, and ought not to be, included in extradition treaties;—such, for instance, as are called political offenses;—yet because one nation will not enter into a compact to deliver

such offenders to another, that does not justify the inference that if such offenders go voluntarily within the jurisdiction of the country whose laws they have offended they may not be rightfully punished, or that they can claim exemption from punishment if they were citizens of another country when the offense was committed, or had, after committing it, acquired another nationality.

"The country whose 'protection' is invoked cannot, it is conceived, properly interpose in such a case unless the municipal law, the violation of which is charged, contravenes some right of such country acquired by treaty stipulations or otherwise. The principle does not at all interfere with the right of any state to protect its citizens or those entitled to its protection when abroad from wrongs and injuries, from arbitrary acts of oppression or deprivation of property, as contradistinguished from penalties and punishments, incurred by the infraction of the laws of the country within whose jurisdiction the sufferers have placed themselves."

Mr. Marcy, Sec. of State, to Mr. Jackson, Jan. 10, 1854. MSS. Inst., Austria. See *infra*, § 230.

Under the treaty with Prussia of 1828 "every American citizen has the incontestable right to enter the Prussian territories and there remain undisturbed, as long as he submits 'to the laws and ordinances there prevailing.'"

Mr. Cass, Sec. of State, to Mr. Wright, May 12, 1859. MSS. Inst., Prussia.

And so as to the treaty with Hanover.

Same to same, Dec. 9, 1859; *ibid.*

"The opinions of the President, concerning the rights and duties of the United States connected with the protection of our citizens and their property abroad, are distinctly set forth in that letter (of July 25, 1858, to General Lamar), and have since undergone no change, as the Government of Nicaragua has been informed. In laying down the principles we maintain, it is said, '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 stands will be enforced, if necessary."

Mr. Cass, Sec. of State, to Mr. Body, Mar. 3, 1860. MSS. Dom. Let. See *infra*, § 230.

"The pretense of the judge on the trial of John Warren, not disavowed by Her Majesty's Government, that, although a duly naturalized citizen of the United States, he still remains a subject of the Queen of Great Britain, amenable in that country to laws which are invalid there against native-born citizens of the United States has awakened a general feeling of resentment and deeply wounded our pride of sovereignty. The people are appealing to this Government throughout the whole country from Portland to San Francisco and from Saint Paul to Pensacola."

Mr. Seward, Sec. of State, to Mr. Adams, Jan. 13, 1868. MSS. Inst., Gr. Brit.; see *infra*, § 230.

"Great Britain is understood to acknowledge that this Government maintains its neutrality in this trial (the Fenian insurrection) with due decision and energy. The maintenance of this neutrality, however, is attended with so much difficulty and inconvenience as to entitle us to the exercise of a corresponding justice and liberality on the part of Great Britain. As naturalized citizens of the United States, Irishmen and their descendants have a right to visit Great Britain, and to be safe in their persons and property there so long as they practice due submission to the authority of Great Britain, the same as native citizens of the United States. When, however, a naturalized citizen of Irish birth or descent, transiently visiting Great Britain, is arrested or questioned under the acts suspending the *habeas corpus*, or by warrant or other form of complaint in judicial proceedings, and thereupon claims the rights of citizens of the United States, he is met in the courts of that country with a denial of the validity of his naturalization, and with the assertion that his allegiance to the sovereign of Great Britain continues unbroken."

Mr. Seward, Sec. of State, to Mr. Johnson, July 20, 1868. MSS. Inst., Gr. Brit. As to denial or undue discrimination of justice abroad, see *infra*, §§ 230, 244.

"It would be very desirable if instructions were given to military or other officers making arrests for any cause, of parties claiming to be citizens of the United States, requiring such officers to cause the nearest consular officer of the United States to be promptly notified of the arrest and of the claim of the party to American citizenship."

Mr. Fish, Sec. of State, to Mr. Sickles, Oct. 27, 1870. MSS. Inst., Spain.

Imprisonment and detention by Germany, in violation of the treaty between the two powers, of a German naturalized in the United States, is a ground for a diplomatic claim for pecuniary redress.

Mr. Fish, Sec. of State, to Mr. Davis, Nov. 21, 1876. MSS. Inst., Germ. Mr. Evarts to Mr. White, June 26, 1879; *ibid.* Same to same, Aug. 27, 1879; *ibid.*

And so as to compulsory and unwarranted ejection from Germany.

Mr. Evarts, Sec. of State, to Mr. Everett, Apr. 30, 1878. MSS. Inst., Germ. See *infra*, § 206.

"In regard to your obligations in respect to Moorish subjects naturalized here who may return to Morocco, I have to remark that you will, under the treaty of 1836, claim for them the same privileges and immunities as may be enjoyed by the citizens or subjects of any other power who also may have been natives of Morocco, unless the Government to which citizens or subjects may owe allegiance shall have a treaty of naturalization with the Emperor. The United States has no such treaty."

Mr. Evarts, Sec. of State, to Mr. Mathews, Dec. 7, 1877. MSS. Inst., Barb. Powers.

For intervention, under joint resolution of Congress, in Condon's case, see *infra*, § 230.

"By a clause of the instrument (organizing the colony of the island of Ciare), citizens of the United States were expressly excluded from being members of that colony. In reply I have to state that this exclusion is regarded here as invidious and as directly at variance with the third article of the treaty of 1831, which stipulates for perfect equality between citizens of the United States and other foreigners who may visit or reside in Mexico. * * *

"The Mexican law forbidding United States citizens from holding real estate in that country, while that privilege is open to other aliens, may also be regarded as incompatible, if not with the letter, certainly with the spirit, of the treaty, the obvious purpose of which was to provide for equality generally between our citizens and other foreigners in that Republic."

Mr. Evarts, Sec. of State, to Mr. Foster, Mar. 26, 1879. MSS. Inst., Mex. See *supra*, § 154.

If the meaning of the action of the Russian Government in a particular case "is that a citizen of the United States has been broken up in his business at St. Petersburg simply for the reason that he is a Jew," then it should be made clear to the Government of Russia that "the religion professed by one of its citizens has no relation whatever to that citizen's right to the protection of the United States."

Mr. Evarts, Sec. of State, to Mr. Foster, Sept. 4, 1880. MSS. Inst., Russia.

As to Russian treatment of Jews, see, further, Mr. Blaine, Sec. of State, to Mr. Foster, June 22, 1881; MSS. Inst., Russia. Same to same, July 29, 1881; same to Mr. Hoffman, Nov. 23, 1881; Mr. Frelinghuysen to Mr. Hunt, Dec. 15, 1882; *ibid.*

As to intervention in behalf of Jews, see *supra*, § 55.

While the Government of the United States, in its negotiations with Russia, insisted that American citizens, when in Russia, should be treated alike, without distinction of creed, the Russian Government maintained that under its treaty with the United States, an American Hebrew is subject to the same local treatment as a Russian Hebrew.

Mr. Frelinghuysen, Sec. of State, to Mr. Noar, June 14, 1882. See Mr. Davis to Mr. Krug, Aug. 23, 1882. MSS. Dom. Let. *Supra*, § 55.

"There is no treaty between the United States and Russia for the protection of naturalized citizens. As a naturalized American citizen, you would, if provided with a passport, be entitled to all the protection due to a native-born American citizen. This does not imply that you would be free from molestation should you return to your native country, and it is not improbable that you would be subjected to various inconveniences, perhaps to arrest. In this case every effort would be exerted in your behalf by the diplomatic and consular officers of the United States, though it is impossible to say with what result. You yourself must, of course, be the judge of the advisability of the visit you contemplate."

Mr. Davis, Asst. Sec. of State, to Mr. Newding, Feb. 14, 1883. MSS. Dom. Let.; *Infra*, § 230.

A discrimination agalnst American citizens, as such, practicing medicine in Syria, will be the subject of protest to the Turkish Government.

Mr. Frelinghuysen, Sec. of State, to Mr. Wallace, June 25, 1883, Aug. 20, 1883. MSS. Inst., Turkey. Same to same, Mar. 27, 1884; *ibid.*

Undeserved indignities inflicted by French authorities on a naturalized citizen of the United States, traveling with a passport, on a process for compelling him, as a Frenchman by birth, to perform military service, will, though followed by a release, be ground for diplomatic appeal to France for redress.

Mr. Frelinghuysen, Sec. of State, to Mr. Morton, Mar. 25, 1884. MSS. Inst., France. See *infra*, § 230.

"The United States nevertheless contend that such special laws [as to persons] exceptional in character and harsh in operation, dispensing with all the safeguards of personal security, cannot with propriety be applied to citizens of the United States who may be peacefully sojourning or traveling in any part of Her Majesty's dominions. And the Government of the United States must contend, and it cannot believe that Her Majesty's Government will deny the contention, that even such harsh laws must be administered with due regard to a citizen's dignity and will not justify chaining a free citizen to culprits and repeatedly marching him through the public streets and holding him for days as a culprit in prison without charge or trial."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, Oct. 22, 1884. MSS. Inst., Gr. Brit.

George's case is discussed in Tunstall's case, *infra*, § 241.

"The Government of the United States recognizes the right of Mexico to prescribe the reasonable conditions upon which foreigners may reside within her territory, and the duty of American citizens there to obey the municipal laws; but those laws cannot disturb or affect the relationship existing at all times between this Government and one of its citizens. The duty is always incumbent upon a Government to ex-

ercise a just and proper guardianship over its citizens, whether at home or abroad. A municipal act of another state cannot abridge this duty, nor is such an act countenanced by the law or usage of nations."

Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, Feb. 17, 1885. MSS. Inst., Mex. See *supra*, § 172*a*; *infra*, § 230. App., vol. iii, § 172*a*.

"While it may not be anticipated that judicial proceedings against aliens in British jurisdiction will be conducted otherwise than in strict conformity to law, and with every constitutional guarantee for the fair trial and defense of the accused, yet it is the clear right and duty of this Government, and, indeed, of any Government, to satisfy itself that its citizens enjoy, whilst temporarily in foreign lands, every right and privilege before the bar of justice, and to see that they are allowed the fullest means of defense. If, therefore, you should find that any citizen of the United States, accused within British jurisdiction of the commission of crime, should, by reason of poverty or friendlessness, or any other cause, not be in enjoyment of all the means of defense which the law assures to him, it is expected that all will be done to aid him which can be done by the representatives of the United States. No expense, however, can be incurred for counsel or otherwise without the authorization of the Department, which in an urgent case may be sought by telegraph."

Mr. Bayard, Sec. of State, to Mr. Lowell, Apr. 10, 1885. MSS. Inst., Gr. Brit.

Discrimination against an American citizen on ground of alienage, by which he is excluded from redress in courts of justice for injuries inflicted on him is a ground for diplomatic interposition.

Mr. Bayard, Sec. of State, to Mr. Phelps, June 4, 1885. MSS. Inst., Peru.

"It is a rule of international law that sovereigns are not liable in diplomatic procedure for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority. This Government could not admit such a demand upon it on the part of any foreign power, and it cannot be expected to make such a demand against a nation with which it treats as an equal sovereign, unless it has acquired by treaty the right to do so. But this view of the matter is qualified by the right to expect that when the circumstances of the case warrant it the Government found morally in default will hasten to tender proper reparation to the injured party."

Mr. Bayard, Sec. of State. to Mr. Clark, Aug. 17, 1885. MSS. Dom. Let.

"Under the laws of Great Britain, a remedy exists for those who have been subjected to unlawful arrest; and citizens of the United States as well as subjects of Great Britain are entitled * * * to avail themselves of that remedy in the regular ordinary courts of justice. The same rule exists and is enforced in the United States with reference to the subjects of Great Britain.

"The case in which this Government assumes to interfere in behalf of one of our citizens, where redress may ordinarily be had in the courts

of the country in which he claims to have been wronged, is that of a denial to him by those courts of the usual means of redress. For the present, therefore, Mr. Davis, who has never resorted to the courts of Great Britain, must be remitted, so far as recovery of pecuniary indemnification from the authors of the trespass is concerned, to the usual remedies to which persons in his situation are by the laws of Great Britain entitled.

"If, however, he does not see fit to press his claim for pecuniary damages in the judicial tribunals of Great Britain against the parties who may have been guilty of trespassing upon his rights, it may be proper to consider the question of asking that Government for an explanation, and, if warranted, an expression of regret."

Mr. Bayard, Sec. of State, to Mr. Gebhard, Sept. 9, 1885. MSS. Dom. Let.

"After reading the telegrams and dispatches (copies of which I inclose for your information) of Mr. J. Harvey Brigham, United States consul at El Paso, Mexico, and also your No. 266, dated the 8th instant, relating to the case of Mr. A. K. Cutting, I telegraphed you on the 19th instant as follows:

"'You are instructed to demand of the Mexican Government the instant release of A. K. Cutting, a citizen of the United States, now unlawfully imprisoned at Paso del Norte.'

"By the documents before me the following facts appear:

"On June 18 last A. K. Cutting, a citizen of the United States, who for the preceding eighteen months had been a resident 'off and on,' of Paso del Norte, Mexico, and as to whose character for respectability strong evidence has been adduced, published in a newspaper of El Paso, Tex., a card commenting on certain proceedings of Emigdio Medina, a citizen of Mexico, with whom Mr. Cutting has been in controversy. For this publication Mr. Cutting was imprisoned on the 22d of June last, at El Paso del Norte, in Mexico. * * * But the paper was not published in Mexico, and the proposition that Mexico can take jurisdiction of its author on account of its publication in Texas is wholly inadmissible and is peremptorily denied by this Government. It is equivalent to asserting that Mexico can take jurisdiction over the authors of the various criticisms of Mexican business operations which appear in the newspapers of the United States. If Mr. Cutting can be tried and imprisoned in Mexico for publishing in the United States a criticism on a Mexican business transaction in which he was concerned, there is not an editor or publisher of a newspaper in the United States who could not, were he found in Mexico, be subjected to like indignities and injuries on the same ground. To an assumption of such jurisdiction by Mexico neither the Government of the United States nor the governments of our several States will submit. They will each mete out due justice to all offenses committed in their respective jurisdictions. They will not permit that this prerogative shall in any degree be usurped by

Mexico, nor, aside from the fact of the exclusiveness of their jurisdiction over acts done within their own boundaries, will they permit a citizen of the United States to be called to account by Mexico for acts done by him within the boundaries of the United States. On this ground, therefore, you will demand Mr. Cutting's release.

"But there is another ground on which this demand may with equal positiveness be based. By the law of nations no punishment can be inflicted by a sovereign on citizens of other countries unless in conformity with those sanctions of justice which all civilized nations hold in common.

"Among these sanctions are the right of having the facts on which the charge of guilt was made examined by an impartial court, the explanation to the accused of these facts, the opportunity granted to him of counsel, such delay as is necessary to prepare his case, permission in all cases not capital to go at large on bail till trial, the due production under oath of all evidence prejudicing the accused, giving him the right to cross-examination, the right to produce his own evidence in exculpation, release even from temporary imprisonment in all cases where the charge is simply one of threatened breach of the peace, and where due security to keep the peace is tendered. All these sanctions were violated in the present case. Mr. Cutting was summarily imprisoned by a tribunal whose partiality and incompetency were alike shown by its proceedings. He was refused counsel; he was refused an interpreter to explain to him the nature of the charges brought against him; if there was evidence against him it was not produced under oath, with an opportunity given him for cross-examination; bail was refused to him; and after a trial, if it can be called such, violating, in its way, the fundamental sanctions of civilized justice, he was cast into a 'loathsome and filthy' cell, where, according to one of the affidavits attached to Mr. Brigham's report, 'there are from six to eight other prisoners, and when the door is locked there are no other means of ventilation'—an adobe house, almost air-tight with a 'dirt floor;' he was allowed about '8½ cents American money for his subsistence;' he was 'not furnished with any bedding, not even a blanket.' In this wretched cell, subjected to pains and deprivations which no civilized Goverment should permit to be inflicted on those detained in its prisons, he still languishes, and this for an act committed in the United States, and in itself not subject to prosecution in any humane system of jurisprudence, and after a trial violating the chief sanctions of criminal procedure.

"These circumstances you will state as giving an additional basis, a basis which, if it be established, this Government will not permit to be questioned, for the demand for Mr. Cutting's immediate release."

Mr. Bayard, Sec. of State, to Mr. Jackson, July 20, 1886. MSS. Inst. Mex.; Senate Ex. Doc. 224, 49th Cong., 1st sess.; For. Rel., 1886. See further as to Cutting's case, *supra*, § 15.

"Since my No. 221, of the 20th instant, I have received no further communication from Mr. Brigham, consul at El Paso, nor from yourself, in connection with the imprisonment of Mr. A. K. Cutting by Mexican authority.

"On Saturday last, the 24th instant, I was called upon by Mr. Romero, the minister from Mexico, at this capital, in relation to the case referred to.

"Mr. Romero produced to me the Mexican laws, article 186, whereby jurisdiction is assumed by Mexico over crimes committed against Mexicans within the United States or any other foreign country; and under this he maintained the publication of a libel in Texas was made cognizable and punishable in Mexico. And thus Mr. Cutting was assumed to be properly held.

"This claim of jurisdiction and lawful control by Mexico was peremptorily and positively denied by me, and the statement enunciated that the United States would not assent to or permit the existence of such extraterritorial force to be given to Mexican law, nor their own jurisdiction to be so usurped, or their own local justice to be so vicariously executed by a foreign Government.

"In the absence of any treaty of amity between the United States and Mexico providing for the trial of the citizens of the two countries respectively, the rules of international law would forbid the assumption of such power by Mexico as is contained in the Penal Code, article 186, above cited. The existence of such power was and is denied by the United States.

"Mr. Romero informed me that the local or State jurisdiction over Cutting's case did not allow interference by the National Government of Mexico in the matter, and that it was this conflict that had induced delay in responding to the demand of this Government for Mr. Cutting's release.

"Mr. Romero finally assured me that I might rely confidently upon Mr. Cutting's release in a very short time, and that there would be no doubt about the compliance of his Government with the demand made through you.

"I communicated these facts to you in order to give you a full comprehension of the case as it appears here, and the disposition of the Mexican Government, *as here* expressed.

"There was a more extended conversation on my part with Mr. Romero on the general subject of the treatment by the Mexican authorities of American citizens, and cases affecting their property and interests.

"I stated to him personally and at some length the single voice that had come to this Department from Mr. Foster, Mr. Morgan, and yourself, in which a declaration was made of the hopelessness of obtaining justice to our citizens in cases where they had been wronged by the officials and Government of Mexico.

"I also called his attention to the avowed policy and action of Mr. Mariscal of compelling all claims wherein the Government of Mexico was sought to be held liable for tortious proceedings to be tried and decided in tribunals of her own creation and under her sole control, whose judgments, he claimed, should be held final and conclusive against citizens of the United States.

"As this pretension of exclusive control was now under consideration and the subject of correspondence, notably in the case of the Rebecca, I stated merely that the United States did not accept the judgments of Mexican tribunals in cases where Mexico was a party to the dispute to be binding upon the United States.

"I passed, however, to the broader view of the necessity of administering international laws in a spirit of amity, comity, and justice; that these were the wise and true paths of peaceful government, and that the alternatives of reprisal and force were the last and most unsatisfactory resorts.

"Mr. Romero is too well convinced to make my renewed avowal necessary that nothing inconsistent with the self-respect, honor, and prosperity of Mexico is desired or intended by the United States, and that it was in the interest of Mexico even more than of the United States that no friction or exasperation should be permitted in the intercourse of the two Governments and of their inhabitants; that to avoid all such irritation or the straining of our friendly relations it is essential that a spirit and readiness to redress wrongs and enforce equitable settlements of matters of difference should be constantly and practically manifested.

"I am persuaded of the good intent of Mr. Romero towards this Government, and believe him also to be patriotically faithful to his own. From him I have assurances that a desire to respond in a friendly and conciliatory spirit influences the present Mexican administration.

"And if this be the true state of affairs, it can be readily demonstrated, and all questions of conflicting interests and opinions now under consideration diplomatically between the two Governments can without difficulty be equitably, honorably, and satisfactorily adjusted."

Same to same, July 27, 1886; *ibid.* See *infra*, § 230. On the subject of non-jurisdiction of crimes committed by foreigners abroad, see Dana's Wheaton, § 115.

"In my No. 224, of the 23d instant, I stated that, in the opinion of this Department, the documents forwarded by you in respect of Messrs. Gaskill and Ward were such as to give the Department no ground to take, by way of diplomatic intervention, exception to the decision of the Mexican tribunal that the evidence adduced against them was sufficient to hold them for trial. This instruction was forwarded to you on the 24th instant. Since then I have had brought to my attention a letter received from the Hon. Milo White, a member of Congress from Minnesota, dated the 23d instant, inclosing a statement from Messrs. Gaskill

and Ward, giving the case a new aspect. It is therein alleged that instead of Mr. Gaskill being in hostile relations with Mr. Hanson, Mr. Gaskill was, by a will unrevoked at Mr. Hanson's death, Mr. Hanson's executor; that he (Mr. Gaskill), being a resident of Campo, Cal., having been postmaster there for twelve years and justice of the peace for ten years, was selected by Mr. Hanson to take charge of his general business interest, which Mr. Hanson was unwilling to put under Mexican supervision; that Messrs. Gaskill and Ward have now been kept in prison for eleven months, without information of the evidence against them, and that they have been approached since their imprisonment by Mexican officials with offers from which it is to be inferred that the object of the prosecution is to obtain possession of Mr. Hanson's estate.

"Under these circumstances, I instruct you to call upon the Mexican Government to direct that the prosecution against Messrs. Gaskill and Ward be brought at once to trial, and that the proceedings should be conducted in such a way as to give the accused in advance a statement of the witnesses to be produced against them and the opportunity of cross-examining these witnesses face to face on trial, and of producing witnesses on their behalf in defense. It will be proper also to state that the trial will be watched by this Government with interest and close attention, so that the Department will be informed if there is any action taken on such trial at variance with the rules of justice acknowledged in common by Mexico and ourselves."

Mr. Bayard, Sec. of State, to Mr. Jackson, July 26, 1886. MSS. Inst., Mex.

"When the diplomatic agent is satisfied that an applicant for protection has a right to his intervention, he should interest himself in his behalf, examining carefully into his grievances. If he finds that the complaints are well founded, he should interpose firmly, but with courtesy and moderation in his behalf."

Printed Pers. Inst. Dip. Agents, 1885.

"Abuses which have heretofore occurred in granting protection from the local authority in eastern countries, and especially in the Turkish dominions, to persons who, in the opinion of this Department, had no claim thereto, render it advisable that the legations and consulates there should once in six months report the number, names, and occupations of the persons to whom during the six months preceding, such protection may have been given, or by whom it may have been claimed. Such report will in future be expected to be made at the beginning of every January and July. It is believed that sound policy dictates the utmost scrutiny and caution in extending the protection of this Government to any persons abroad not citizens of the United States. This policy, scrupulously adhered to is apt to afford more efficient protection to those to whom it is really due. Such protection should in no event be given to aliens not actually in discharge of official duty under the direction of the respective diplomatic agents and consular officers or employed in their domestic service, or when it will operate to screen the holder from prosecution for offenses against the laws of the country, or when reasonable ground exists for objection by the Government. No instrument in the nature of a passport should be issued to aliens thus

protected; it will be sufficient to grant, when necessary, a certificate setting forth their relation and duties in connection with the legation or consulate."

Ibid.

As to right of asylum see *supra*, § 104.

A correspondence with Great Britain concerning the arrest and imprisonment of American citizens in Ireland, in 1848, will be found in Brit. and For. St. Pap. for 1856–'57, vol. 47, 1222.

As to arrest of naturalized citizens of the United States in Great Britain and Ireland, see report of Acting Sec. of State, F. W. Seward, Mar. 14, 1868, Senate Ex. Doc. 42, 40th Cong., 2d sess.; House Ex. Doc. 10, 40th Cong., 1st sess.; House Ex. Doc. 66, 40th Cong., 3d sess.; Senate Mis. Doc. 141, 41st Cong., 2d sess.; House Ex. Doc. 170, 41st Cong., 2d sess.; House Rep. 342, 43d Cong., 1st sess.; Brit. and For. St. Pap., 1867–'68, vol. 58; 1869–'70, vol. 60.

The following document may be referred to in the same relation:

McSweeny, Daniel, imprisonment in Ireland. President's message, Mar. 20, 1882, Senate Ex. Doc. 139, 47th Cong., 1st sess.

McSweeny, Daniel, resolution of Senator Voorhees censuring State Department for its conduct in connection with, Apr. 3, 1882, Senate Mis. Doc. 75, 47th Cong., 1st sess.

O'Donnell, Patrick, trial and execution of, by British Government. Letter from the Secretary of State, Jan. 8, 1884; House Ex. Doc. 33, 48th Cong., 1st sess.

"Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign Government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union, by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered."

Miller, J.; Slaughter-House cases, 16 Wall., 79, 80.

Citizens are members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a Government for the promotion of their general welfare and the protection of their individual as well as their collective

rights. The duty of a Government to afford protection is limited always by the power it possesses for that purpose.

U. S. *v.* Cruikshank, 92 U. S., 542.

A nation ought not to interfere in the causes of its citizens brought before foreign tribunals, except in a case of refusal of justice or of palpable injustice.

1 Op., 53, Bradford, 1794.

When a suitor applies to a foreign tribunal for justice, he must submit to the rule by which that tribunal is governed.

Ibid.

In regard to the protection of our citizens at home and abroad, the laws of the United States make no distinction between native and naturalized citizens.

9 Op., 356, Black, 1859.

The doctrine that a naturalized citizen ought to be protected everywhere, except in the country of his birth, but that his naturalization may be disregarded there, has no foundation, except the untenable dogma which denies the right of expatriation without the consent of his native country. He may be arrested for a debt or a crime, but he cannot rightfully be punished for the non-performance of a duty supposed to grow out of his abjured allegiance. A sovereign cannot excuse a violation of public law by a provision in his own municipal code. A foreign Government cannot excuse the arrest of a naturalized citizen of the United States on the ground that he emigrated contrary to its laws.

Ibid.

If a citizen of the United States, whether native-born or naturalized, commit a crime in Great Britain, his citizenship will not protect him from the penalty of his crime; nor can he complain that he is not accorded a right which would be granted to a British subject on trial for crime in the United States.

12 Op., 319, Stanbery, 1867.

(2) RIGHT MAY BE FORFEITED BY ABANDONMENT OF CITIZENSHIP.

§ 190.

See on this topic *supra*, § 176.

The British Government acquiesced in the execution of Arbuthnot and Ambrister by General Jackson in Florida in 1818, on the ground that by going to Florida and entering into the service of parties engaged in attacks on a friendly power, they had forfeited the right to claim the protection of the British Government.

See 3 Schouler's Hist. U. S., 72 *ff.*

As to Arbuthnot and Ambrister, see fully, *infra*, §§ 216, 243, 348*a*.

A citizen of the United States engaged, when in a foreign country, in attacks on the Government of such country has forfeited his claim to the protection of his own Government.

Mr. Webster, Sec. of State, to Mr. Peyton, Jan. 6, 1842. MSS. Dom. Lot.

"You inform us that many American citizens have gone to settle on the (Sandwich) islands; if so they have ceased to be American citizens. The Government of the United States must, of course, feel an interest in them not extended to foreigners, but by the law of nations they have no right further to demand the protection of this Government. Whatever aid or protection might under any circumstance be given them, must be given, not as a matter of right on their part, but in consistency with the general policy and duty of the Government in its relations with friendly powers.

"You will therefore not encourage in them, nor indeed in any others, any idea or expectation that the islands will become annexed to the United States. All this, I repeat, will be judged of hereafter as circumstances and events may require by the Government at Washington."

Mr. Webster, Sec. of State, to Mr. Severance, July 14, 1851. MSS. Inst., Hawaii.

A party who took out in Cuba "letters of domiciliation, in order to enable him to transact business, such as a Spanish subject or a domiciliated foreigner can alone transact, and actually swore allegiance to the Spanish Crown," is precluded from calling on this Government for aid in a claim against Spain.

Report to President by Mr. Webster, Sec. of State, Dec. 23, 1851; 6 Webster's Works, 523, 524. (Thrasher's case. (See *infra*, §§ 203, 229, 249, 257.) This report is not on record in the Department of State.)

See dispatch of Mr. Owen, consul, &c., to Mr. Webster, Sec. of State, Dec. 2, 1851; House Ex. Doc. 14, 32d Cong., 1st sess.

"It is undoubtedly true that an American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own Government; and if, without the violation of any municipal law, he should be treated unjustly, he would have a right to claim that protection; and the interposition of the American Government in his favor would be considered as a justifiable interposition. But his situation is completely changed when, by his own act, he has made himself the subject of a foreign power. And a person found residing in a foreign country is presumed to be there *animo manendi*, or with the purpose of remaining, and to relieve himself of the character which this presumption fixes upon him he must show that his residence was only temporary, and accompanied all the while with a fixed and definite intention of returning. If in that country he engages in trade and business he is considered by the law of nations as a mer-

chant of that country; nor is the presumption rebutted by the residence of his wife and family in the country from which he came. This is the doctrine as laid down by the United States courts. And it has been decided that a Spanish merchant who came to the United States and continued to reside here and carry on trade after the breaking out of war between Spain and Great Britain, is to be considered an American merchant, although the trade could be lawfully carried on by a Spanish subject only."

Ibid.

See, further, for Mr. Webster's report in Thrasher's case, *infra*, §§ 198, 203, 229, 230, 244, 357. See *supra*, § 176.

"Mr. Webster, Secretary of State, refused to consider as entitled to the protection of the United States a native-born citizen, who, after having taken out letters of domiciliation to enable him to transact business in Cuba as a Spanish subject or domiciled foreigner, was charged with being implicated in the Lopez expedition of 1850. In answer to a resolution of the House of Representatives he said, December, 1850: 'No man can carry the ægis of his national American liberty into a foreign country and expect to hold it up for his exemption from the dominion and authority of the laws and sovereign power of that country unless he be authorized so to do by the virtue of treaty stipulations.' Thrasher's case, Cong. Doc., 32d Cong., 1st sess., House Ex. Doc. 10."

Lawrence's Wheaton (ed. 1863), 176; 3 Lawrence com. sur droit int. 138.

As to Thrasher's case, see further Senate Ex. Doc. 5, 32d Cong., 1st sess.; House Ex. Doc. 10, 14, 32d Cong., 1st sess. *Infra* §§ 203, 229, 257.

Persons voluntarily emigrating from the United States to take up a permanent abode in a foreign land, "cease to be citizens of the United States, and can have after such a change of allegiance no claims to protection as such citizens from our Government."

Mr. Marcy, Sec. of State, to Mr. Kinney, Feb. 4, 1855. MSS. Dom. Let.

"Though there is no law forbidding a citizen of this country who goes abroad with an intention to settle, to resume his rights as a citizen on his return, how long soever he may have been absent, while he is under the jurisdiction of the foreign Government, for the purpose of carrying on business, and especially as in this case, for engaging in mining operations, he must be presumed to have been satisfied with the ability and disposition of such Government to protect his property and his person.

"It is essential to the independence of nations, and to the public peace, that there should be some limit to the right and duty of a Government to interfere in behalf of persons born or naturalized within its jurisdiction, who, on proceeding to a foreign country, and being domiciliated there, may receive injuries from the authorities thereof. By the general law, as well as by the decisions of the most enlightened judges both in England and in this country, a neutral engaged in business in an enemy's country during war, is regarded as a citizen or subject of that country, and his property, captured on the high seas, is liable to con-

demnation as lawful prize. No sufficient reason is perceived why the same rule should not hold good in time of peace, also, as to the protection due to the property and persons of citizens or subjects of a country domiciled abroad."

Mr. Marcy, Sec. of State, to Mr. Clay, May 24, 1855. MSS. Inst., Peru.

"Citizens of the United States, who, retaining their domiciles in the United States, are temporarily traveling or sojourning in New Granada, are to be regarded as entitled to the protection of their own Government against any impositions of the Government there for its support and maintenance. But citizens of the United States, no matter how they acquired that title, who have gone to New Granada, become domiciliated there, and are pursuing business or otherwise living there, without definite and manifest intentions of returning to this country, are subject to all the laws of New Granada affecting property or material rights exactly the same as the citizens of New Granada."

Mr. Seward, Sec. of State, to Mr. Burton, Jan. 16, 1862. MSS. Inst., Colombia.

"This Government owes to no citizen who has voluntarily withdrawn his person and property from the country, any obligation to lend him its political powers to influence in his favor the adjudication of the courts of justice of the country in which he proposes to reside, in the trial of questions arising upon contracts made under the laws of that country."

Same to same, Jan. 30, 1863; *ibid.*

Citizens of the United States who were concerned in the insurrection of 1860 against the United States, and who, after its close, decline to return to their allegiance, and go into the service of a foreign country, are not entitled to the interposition of the Government of the United States for redress for injuries inflicted on them in such foreign country.

Mr. Seward, Sec. of State, to Mr. Sullivan, Feb. 4, 1869. MSS. Inst., Colombia.

Whether a citizen of the United States, who is an absentee in a foreign land has paid his internal-revenue tax in the United States, is a matter to be considered in determining the question whether such citizen can avail himself of the protection of the United States against the country of his abode.

Mr. Fish, Sec. of State, to Mr. Brauno, Dec. 7, 1870; MSS. Dom. Let. Mr. Fish to Mr. Overmann, Jan. 13, 1871; *ibid.* See also Mr. Fish to Mr. Wilson, Dec. 5, 1870; Mr. Fish to Mr. Allen, Jan. 18, 1871; *ibid.*

"An application has been made to this Department, in a letter dated the 1st ultimo, and signed Mathieu Orlich, for a passport. * * *

"The applicant states, as you will observe, that he obtained a passport from this Department in 1853 or 1854; but upon examination of the Department records, this statement appears to be inaccurate. If Mr. Orlich is entitled to a passport, an application to you would have been sufficient to secure one. * * *

"In judging Mr. Orlich's claim to protection as an American citizen, you have the principle laid down in the circular from this Department issued October 14, 1869, to guide you. Without determining that the continued residence in Turkey of an Hungarian or Austrian who may have been naturalized as an American citizen is necessarily to be regarded in the same light as the circular indicates with respect to a naturalized citizen returning to the country of his nativity, it may well be that the same principle applies. The fact of the person having been born in a contiguous jurisdiction assimilates his case very closely to the case contemplated by the circular, which was intended only to indicate the general principle and theory by which the agents of the Government in foreign countries are to be governed in deciding the questions which come before them.

"Among the tests which may be applied to determine the intent of a naturalized person who resides continuously abroad, the fact of payment by such person of the income and excise taxes which have been imposed by law (since 1861) upon American citizens will be an important aid. Inquiry should be made when, and in what assessment district, the returns required by the internal-revenue laws have been made; where and to whom the taxes have been paid. The omission to have made the returns, or to have paid any tax, would necessarily cast grave suspicion upon the claim of the party applying for the protection of a Government from whose support he has withheld the contributions required of all its citizens, whether resident at home or abroad; and if such omission has been long continued, it will, as a general rule, justify the refusal of a recognition of the claim to protection."

Mr. Fish, Sec. of State, to Mr. MacVeagh, Dec. 13, 1870. MSS. Inst., Turkey; For. Rel., 1871.

"Citizenship involves duties and obligations, as well as rights. The correlative right of protection by the Government may be waived or lost by long-continued avoidance and silent withdrawal from the performance of the duties of citizenship as well as by open renunciation."

Mr. Fish, Sec. of State, to Mr. Niles, Oct. 30, 1871. MSS. Dom. Let. To same effect see Mr. Fish to Mr. Colfax, Mar. 12, 1872; *ibid.* Mr. Fish to Mr. Howard, Apr. 23, 1872; *ibid.* See, more fully, *supra*, § 176.

"A citizen of the United States who voluntarily enlists in a foreign army has no claim on this Government to intervene to procure his discharge."

Mr. Fish, Sec. of State, to Mr. Bliss, Nov. 4, 1872. MSS. Inst., Mex.

A citizen of the United States may forfeit the protection of its Government abroad by making his permanent residence abroad and evading performance of the duties of citizenship.

Mr. Fish, Sec. of State, to Mr. Beardsley, Apr. 28, 1873. MSS. Inst., Barb. Powers.

"When a citizen of the United States goes abroad without any intention to return, he forfeits, with the abandonment of his country, all rights to the protection of its Government."

Mr. Fish, Sec. of State, to Mr. Hackett, June 12, 1873. MSS. Dom. Let.

"The Court of Claims, adopting the language of my predecessor, Mr. Seward, has decided it to be the law and usage of nations that one who takes up a residence in a foreign place and there suffers an injury to his property by reason of belligerent acts committed against that place by another foreign nation, must abide the chances of the country in which he chooses to reside, and his only claim, if any, is against the Government of that country, in which his own sovereign will not interest himself. Such has been the doctrine and practice of the United States and of the great powers of Europe."

Mr. Fish, Sec. of State, to Mr. Sickert, Apr. 18, 1875. MSS. Dom. Let.

That in such cases renunciation of citizenship may be inferred, see Mr. Fish, Sec. of State, to Mr. Davis, Jan. 19, 1875. MSS. Inst., Germ. Mr. Fish to Mr. Davis, June 2, 1875; Mr. Fish to Mr. Davis, July 21, 1875; Mr. Blaine to Mr. Everett, Aug. 24. 1881, *ibid.* Same to same, Aug. 23, 1881; Mr. Frelinguysen to Mr. Kasson, Jan. 15, 1885; *ibid.* See *supra*, § 176.

A citizen of the United States who accepts and enters on an intended permanent domicil in a foreign state loses the right to claim the diplomatic interposition of the Government of the United States against such foreign state.

Mr. Evarts, Sec. of State, to Mr. Logan, Mar. 9, 1881. MSS. Inst., Cent. Am.

"From the tenor of your telegram of the 20th instant I learn that six American suspects are still detained in prison. Of these six cases three, viz, O'Mahoney, McSweeney, and McEnery, had been previously made known to the Department. The cases of Slattery, Brophy, and Gannon are now made known to us for the first time.

"It appears from documents on file in this Department that O'Mahoney in 1866 made application in Louisiana for naturalization under the soldiers' act (Rev. Stat., § 2166), and was refused, for what cause is not stated. He then returned to Ireland, where he remained. In October, 1875, he went into business as a keeper of a public house and retailer of liquors, at a place called Ballydehob. This business has been carried on in his name since 1875. In 1878 he came to the United States of America, and obtained naturalization here in February, 1880, without stopping his business in Ballydehob. He then returned to Ireland, where he was and still is a rate-payer, tax-payer, and voter, and offered himself as a candidate for poor-law guardian. He was elected, qualified, and entered upon the discharge of the duties of the office, and was discharging them when arrested. His imprisonment under his present arrest dates from November last.

"On this statement it cannot be denied that O'Mahoney is a citizen of the United States. The assurance which the ordinary processes of

naturalization give to the United States that its citizenship is sought with a purpose of forming part of its population, and contributing to its wealth and its strength, is waived in this statute, and that great privilege is conferred for the sole consideration of a year's service in its military forces. And although that alleged service had been rendered fifteen years before the naturalization, and although the person seeking the naturalization had abandoned the country and was in business in a foreign land, and holding office there with every apparent purpose of remaining there permanently, the language of the act seemed to leave the court no discretion to refuse the decree when it was once proved that the applicant had enlisted in the armies of the United States, that he had been honorably discharged therefrom, and that he had resided more than one year in the United States previous to his application.

"In this statement I make no account of the fact that O'Mahoney informed the consul at Cork that his alleged service was in the Navy. If his statement to the consul was correct, his alleged naturalization was fraudulent and in violation of law under the settled rulings of this Government. This precise point has been decided by the district court of the United States for the district of Oregon. (*In re* Bailey, 2 Sawyer, 200.) [But see Stewart's case, cited *supra*, § 173.]

"Assuming, however, that the naturalization was within the letter of the law, the President is of the opinion that it was only just within the letter, and that it was wholly outside the spirit and intent of the naturalization laws. We generously welcome aliens within our folds with the expectation that they are really to become bone of our bone and flesh of our flesh; that they are to cast their lots in with us, and that the fruits of their industry are to form part of our national wealth. But when an alien is at the very time of his naturalization, and for years before has been, a resident and office-holder in the country of his origin, when after his naturalization he puts his certificate in his pocket and returns to the country of his origin, and continues to reside there in business and holding office, the President feels it to be his duty to afford to such a citizen only the measure of protection demanded by the strictest construction of duty, namely, that he shall receive from the hands of the Government under which he is holding office the measure of protection which it affords to its own citizens or subjects.

"Mr. McSweeney was naturalized many years since and resided in San Francisco, engaged in the cattle trade. About six years ago he returned with his family to Ireland and purchased some property there. For the last six years he has been residing there, and it is understood that he also is holding office as a poor-law guardian with an apparent purpose of remaining in Ireland. He is a gentleman of influence and appears to have taken a prominent part in the troubles which are now agitating Ireland. He says that his action has been that of a peaceable citizen and within the line of the law. The British authorities maintain that they have good right to suspect him of inciting persons unlaw-

fully to assemble together and to commit riot and assault. It is understood that the British authorities are ready to release him if he will leave Ireland.

"The President has carefully considered this case also. When a naturalized citizen resumes his residence with his family in the land of his origin, and goes into business there, and becomes an office-holder, and takes active part in political discussions, if it turns out that his action gives offense to the local government, and he is thrown into prison, the laws and interests of the United States do not require us to do more than insist that he shall have a right to return to the country of his adoption, leaving the question of damages for future discussion.

"Such is understood to have been the course pursued by the United States during the late civil war. In September, 1862, the British chargé d'affaires at Washington requested the discharge of one Francis Carroll, a British subject, who had been arrested by the military authorities in Baltimore. Mr. Seward refused the request, and in a note to Mr. Stuart said:

"'Is the Government of the United States to be expected to put down treason in arms and yet leave persons on liberty who are capable of spreading sedition? * * * Certainly the Government could not expect to maintain itself if it allowed such mischievous license to American citizens. Can the case be different when the dangerous person is a foreigner living under the protection of this Government? I can conceive only one ground upon which his release can be ordered, and that is that he may be too unimportant and too passionate a person to be heeded in his railings against the Government. But you will bear in mind that the times are critical, and that sedition is easily moved now by evil-designing men who in times of peace might be despised.' (Dip. Corr. 1862, p. 228.)

"A correspondence ensued, which resulted in a proposal that—

"'Mr. Carroll should be released from custody upon his agreeing to leave the United States immediately, and not return again during the continuance of this rebellion, and giving security to the approval of the United States marshal that he will keep said agreement.' (Dip. Corr. 1863, p. 460.)

"This offer was accepted by the British chargé d'affaires, and Mr. Carroll was discharged.

"The President cannot assume that an exercise of national sovereignty which was performed by the United States when their security was assailed cannot be performed by other powers similarly situated, subject, of course, always to be questioned when the good faith of its exercise may be drawn in doubt.

"But in the exercise of such an extreme right of sovereignty the comity of nations demands that the power exercising it should hold itself ready at all times to explain to the power on whose citizens it has been exercised the reasons which have compelled it. It cannot be doubted

that Her Majesty's Government will observe the same spirit of courtesy in this respect that the Government of the United States displayed when the case was reversed. You will therefore inquire of Lord Granville why these two prisoners are detained, and if it should appear that we are correctly informed as to their history and as to their active participation in the local politics of Ireland, and you are assured that they may leave the country at any moment they please, you will communicate these facts to the Department and await further instructions.

"As to the prisoner McEnery, it is understood here that he was arrested last June on suspicion of being concerned in an assault and in breaking into a dwelling. It is now nearly a year since this arrest was made, and, making due allowance for the exceptional condition of Ireland, the President is of opinion that the time has come when Her Majesty's Government should frankly state why he is held and when he may have an opportunity of defense. The President, on entering upon the duties of his office on the death of President Garfield, was ignorant of these arrests and of their nature. My attention was not called to them when I took charge of the Department. It was not until I had been here some weeks that the friends of the prisoners brought the real facts to my knowledge. Since then, under direction of the President, I have spared no effort to have this matter properly adjusted. I am bound to say that our exertions have been met in a spirit of friendship by Her Majesty's Government; but it assumes as the basis of its action a principle to which the President cannot assent. In his note of the 6th April, to Mr. West, Lord Granville quotes with approval the following extract from a note of the 14th October, 1861, from Mr. Seward to Lord Lyons:

"'In every case subjects of Her Majesty residing in the United States and under their protection are treated, during the present troubles, in the same manner and with no greater or less rigor than American citizens.' * * *

"Its [American citizenship] assumption implies the promise and the obligation to observe our laws at home, and peaceably as good citizens to assist in maintaining our faith abroad, without efforts to entangle us in internal troubles or civil discord with which we have not, and do not wish to have, anything to do. When an American citizen thus conducts himself, whether at home or abroad, he is entitled to the confidence of his Government and active support of all its officials. If business interests or the ties of affection take him into lands where from any cause laws which protect him from arrest and imprisonment do not exist, his Government claims the right to interpose its own shield to take the place of the protection which is denied by local laws.

"The President is aware that Ireland is now in an exceptional condition. But even if all be true which is stated; if it is impossible to conduct a trial by jury of a breaker of the peace with any hope to conviction, even with the clearest proof; if the witness who testifies

against such an offender does it with his life in his hands; if it be impossible for owners of property to collect rents under any process of law; if those who are responsible for the administration of law in Ireland are seeking to do away with this unhappy condition—even if all this be true, it furnishes no sufficient reason why an American citizen should remain incarcerated without accusation, without chance of trial, without opportunity for release. The President is gratified to observe that the claim thus to hold American citizens is modified by the following language in Lord Granville's instruction of April 6 to Mr. West:

"'The Irish Government have in many instances released prisoners upon a reasonable belief that it could be done without risk to the public safety, and I need hardly say that Her Majesty's Government are not desirous of detaining unnecessarily in prison any person from whom no danger to the public peace is to be apprehended.

"'They will therefore be prepared to consider the circumstances of any citizens of the United States now detained who may be willing to engage forthwith to leave the United Kingdom.'

"The President, moreover, has little doubt that Her Majesty's Government do not intend to insist in practice upon the extreme doctrine that an American citizen against whom there is no charge shall, without trial, remain in prison or leave the United Kingdom. But he believes, by fairly considering each case as it arises, conclusions will be reached satisfactory to both Governments.

"After satisfying yourself that the three persons whose names are now reported to us are citizens, you will ask Her Majesty's Government why they are detained, and whether it is contemplated to give them trials, reporting by cable; and should your intervention or protection be claimed by others hereafter, you will be governed by the rules and principles laid down in this dispatch."

Mr. Freylinghuysen, Sec. of State, to Mr. Lowell, Apr. 25, 1882. MSS. Inst., Gr. Brit.; For. Rel., 1882.

"It appears from your statement that you emigrated from the United States to Fiji in 1866, your object being to obtain a residence in a climate more favorable to your health. You there made considerable investments. In 1875 the Fiji Islands were annexed to Great Britain, and it appears that you suffered various injuries, both from the Fiji and the British Governments, which would entitle you to redress at least from the latter; and if you were a citizen of the United States, domiciled in the United States, you might in some contingencies sustain an appeal for the diplomatic intervention of this Department. Whether you still remain a citizen of the United States is a question which it is not necessary here to discuss. It is sufficient to say that your adoption of Fiji as a permanent home leads the Department to infer that you accepted a Fiji domicil. If so, your continuance in Fiji after British annexation makes your domicil British, and under these circumstances

it is not thought that you can lay claim to the diplomatic intervention of the Department.

"It was held in a recent case that, if a domicil in New Mexico was proved to have attached to a British subject there resident, this excluded such party from the right to appeal to British intervention for redress for wrongs inflicted on the party in New Mexico. The same principle rules the present case.

"No doubt the grievances of which you complain entitle you to much sympathy, but, if domiciled in Fiji, your redress must now be sought from the British Government, either because it sanctioned such injuries or because it stands in the place of the Fiji authorities, by whom they were perpetrated."

Mr. Porter, Acting Sec. of State, to Mr. Burt, July 11, 1885. MSS. Dom. Let. See *supra*, § 176. See Mr. Bayard to Mr. Hanna, June 25, 1886. MSS. Inst., Arg. Rep.

"The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own Government, and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favor would be considered as a justifiable interposition. But his situation is completely changed where by his own act he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States—a point not intended to be decided—yet it certainly places him out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance, and, consequently, takes him out of the description of the act."

Marshall, C. J.; Murray *v.* Schooner Charming Betsy, 2 Cranch, 120. See the Santissima Trinidad, 1 Brock, 478.

Where a citizen of the United States at different times obtained Austrian passports, traveled as an Austrian subject, and resided many years in the country, he will be considered an Austrian, on the ground that consent, together with the laws of that country, has effected a change in his nationality.

14 Op., 154, Williams, 1872.

(3) Care of destitute citizens abroad not assumed.

§ 190a.

While the Federal and State Governments in this country make provision for the care of all destitute, sick, or infirm persons within their borders, without regard to nationality, no provision as yet exists in most States, or under the Federal system, for the relief of destitute, sick, or infirm citizens of the United States abroad.

Mr. Seward, Sec. of State, to Mr. Motley, Apr. 7, 1862. MSS. Inst., Austria.

The Government of the United States cannot undertake "to become almoners in foreign countries to bring back at the public expense recreant or inconstant citizens who fall into misfortune abroad."

Mr. Seward, Sec. of State, to Mr. Fogg, July 28, 1864. MSS. Inst., Switz. See Mr. Evarts, Sec. of State, to Mr. Fish, Mar. 5, 1880; *ibid.*

"The Government of the United States makes no provision by law for the relief of their indigent or distressed citizens, other than seamen, in foreign countries."

Mr. Fish, Sec. of State, to Mr. Delfosse, Dec. 22, 1869. MSS. Notes, Belgium.

"Congress, from the beginning of the Government, has wisely made provision for the relief of distressed seamen in foreign countries; no similar provision, however, has hitherto been made for the relief of citizens in distress abroad, other than seamen. A similar authority, and an appropriation to carry it into effect, are recommended in the case of citizens of the United States destitute or sick under such circumstances."

President Grant, Fifth Annual Message, 1873.

"I will add that instances of insanity on the part of citizens of the United States abroad have, from time to time, been reported to this Department, by ministers and consuls. When their friends here were known, they were apprised of the case, that they might relieve the sufferer. When, however, we could obtain no information as to those friends, or these were unable to provide relief, the case has been reported to the governor of the State of which the patient might be a citizen, so that proper relief might be afforded."

Mr. Evarts, Sec. of State, to Mr. Shishkin, Jan. 8, 1879. MSS. Notes, Russia.

"There is no appropriation or authority for the relief by a diplomatic officer of a distressed citizen of the United States, or for furnishing him transportation home. The exception in the case of seamen falls under consular administration."

Printed Pers. Inst. Dip. Agents, 1885. See as to seamen, *supra*, §§ 124 *ff.*

IX. *PASSPORTS.*

(1) Can only be issued by Secretary of State or head of legation.

§ 191.

"This Government has a right to ask that if citizens of the United States, who are traveling with regular passports, or what appear to be such passports, happen to fall under unjust suspicions, every facility will be granted to them to vindicate their innocence. The refusal to let friends communicate with them while under arrest, or to let them appeal to our consuls and ministers, was an illiberality of treatment on the part of subordinate officials that cannot but be reproved by the Executive Government of Switzerland. It is expected that they will take proper steps to prevent this in future.

"To preserve proper respect for our passports, it will be necessary to guard against frauds as far as possible in procuring them. I regret to say that local magistrates or persons pretending to have authority to issue passports, have imposed upon persons who go abroad with these spurious papers. Others again who know that they are not entitled to passports—not being citizens of the United States—seek to get these fraudulent passports, thinking that they will protect them while abroad."

Mr. Marcy, Sec. of State, to Mr. Fay, Oct. 4, 1854. MSS. Inst., Switz.

The earlier practice had been less strict. Thus in a note of Lord Grenville, November 3, 1796, to Mr. King, United States minister at London, Lord Grenville stated: "The consuls of the United States residing in His Majesty's dominions have, for some time past, been in the habit of granting to seafaring persons certificates under their consular seal, purporting that the bearers of them are citizens of the United States, and as such liable to be called upon for the service of their own country, and that they are therefore not to be interrupted or molested by any persons whatever. I have reason to believe that those certificates have frequently been granted on very slight and insufficient evidence, and to a great number of persons who were in fact British seamen. But, independently of this abuse, I am under the necessity of representing to you, on the part of His Majesty's Government, the insuperable objections which apply to the principle of a jurisdiction in this respect assumed and exercised within His Majesty's dominions by the consuls of a foreign nation." In reply, Mr. King, on November 18, states: "I am at present inclined to believe that the administration of oaths by our consuls, in these or in any other cases, to British subjects, is neither necessary nor proper. * * * I would not be understood as giving a settled opinion on this point. I ought not to omit observing to you that neither our laws respecting consuls, nor the late law for the relief and protection of American seamen, give to our consuls any authority to grant certificates of citizenship, and I have seen no instruction from the Executive that authorizes it." Mr. King, on December 10, 1796, wrote to the Department, "I do not consider myself authorized to instruct our consuls in this or in any other instance."

See, further, Lord Grenville's letter to Mr. King, Mar. 27, 1799. 2 Am. St. Pap. (For. Rel.), 148.

"With the practice of Massachusetts in issuing certificates of citizenship to citizens of that Commonwealth going abroad, this Department has no concern. If those documents have answered all the purposes of passports in all parts of the civilized world, it was probably owing to their having been authenticated by a minister or consul of the United States, more especially in countries where vigilance is exercised in regard to the introduction of foreigners."

Mr. Forsyth, Sec. of State, to the secretary of the Commonwealth of Massachusetts, Apr. 21, 1835. MSS. Dom. Let.

No officer in the United States, except the Secretary of State, is authorized to issue passports or instruments in the nature of passports.

Mr. Fish, Sec. of State, Circular, Jan. 10, 1872. MSS. Inst., Arg. Rep.

Passports issued by governors of States are not only invalid, but invasions of the exclusive prerogative of the Government of the United States in this relation.

Mr. Fish, Sec. of State, to Mr. Coke, Mar. 23, 1875. MSS. Dom. Let. See also Mr. Cadwalader, Asst. Sec. of State, to Mr. Raine, Apr. 23, 1875. Mr. Fish to Mr. Kellogg, June 5, 1875. See letter of Mr. Frelinghuysen, Sec. of State, to Mr. Brewster, Feb. 12, 1884. MSS. Dom. Let.

The issuing, by a notary in this country, of a "certificate of identity" to a person about to travel abroad, is an infraction of the statute prohibiting "all persons acting, or claiming to act, in any office or capacity under the United States who shall not be lawfully authorized so to do," from "issuing any passport or other instrument in the nature of a passport," etc.

Mr. Evarts, Sec. of State, to the Governer of New York, June 8, 1877. MSS. Dom. Let.

A certificate and affidavit issued by a consul of the United States in Germany to citizens of the United States about to marry in Germany, as to their citizenship, is not a passport.

Mr. Evarts, Sec. of State, to Mr. Everett, Apr. 26, 1878. MSS. Inst., Germ.

"No persons other than the Secretary of State of the United States and such diplomatic and consular officers as may be designated by the President are authorized to issue passports at all, and none can be issued except to American citizens."

Mr. Evarts, Sec. of State, to Mr. Cooper, Nov. 22, 1879. MSS. Dom. Let.

A United States consul in China is not authorized to grant or issue a passport unless in the absence from China of the diplomatic representative of the United States. Nor is it permissible for such representative to send passports signed by him in blank to be filled up by the consul.

Mr. Frelinghuysen, Sec. of State, to Mr. Young, Sept. 27, 1884. MSS. Inst., China. See Mr. Frelinghuysen, Sec. of State, to Mr. Russell, Jan. 19, 1885, *ibid.*, where it is said "although the custom of issuing blank passports sealed and signed by the minister was approved by the Department in dispatch No. 79, of Sept. 11, 1876, it is not thought proper to continue the practice."

"It is expected that sections 118–133 in Personal Instructions, in connection with Forms 1, 14, and 15 in the appendix to the same, respecting passports, shall be exactly observed. The oath of allegiance as there given should be administered in all cases.

"There is no objection to allowing the consuls to receive applications for passports according to the same forms used by the legation. Such applications should be made under oath, the identity of the applicant properly testified to, and the application signed and sealed by the consul be transmitted in duplicate to the legation with the prescribed fee

of $5. The legation will then pass upon it and send the passport through the consul if there be no objection. One copy of the application should be kept in the legation and the other transmitted to the Department with the quarterly returns. This system has been in use in Germany for over ten years and been found to work well.

"Passports are still rigorously insisted on from travelers entering Russia, and also in Germany for persons remaining any length of time in the large cities or studying at the universities, and there appears in those countries to be, as yet, no tendency towards a relaxation of these formalities."

Mr. Bayard, Sec. of State, to Mr. McLane, Mar. 8, 1886. MSS. Inst., France.

"There was doubtless a time when a rigid surveillance of travel was necessary, but it is confidently submitted that passports are no longer needed as a prudential device, while the cost of the documents and of the Spanish consular authentications thereof is a serious obstruction to travel and forms a heavy personal tax and inconvenience upon travelers between the United States and Cuba.

"As a means of controlling individuals, the efficacy of passports is questionable, for little or no impediment can exist to their procurement, either in a regular way upon proof of citizenship, or by subterfuge, by the few to whom precautionary measures might apply and who are interested in avoiding them, while upon the mass of honest travelers they impose an expensive and useless burden. Admitting that passports may serve as a check in certain cases, their usefulness in this sense is more than counterbalanced by the international considerations attaching to such documents. Passports are *prima facie* evidence of the individual's right as a citizen to the protection of the Government which issues them, and a special responsibility rests upon the Government that disregards such evidence. The system, in fact, requires the issuing Government to demand for the bearer such treatment and protection as it gives *e converso* to aliens within its jurisdiction, and binds the other to respect the evidence which has been thus furnished.

"The modern systems of travel, moreover, are on definite and regular lines of communication. Individuals traveling by separate conveyance from one country to another are rarely encountered, and to them the conditions of the passport system do not apply. By the aid of the electric telegraph instant notice can be given of anything like the formation of a hostile expedition, or even of the embarkation of a single dangerous individual.

"The Government of the United States has given to that of Spain, within the last decade, such frequent and impressive evidence of its vigilant execution of its neutrality laws, and of promptness in arresting all hostile movements directed against peace and order in the Antilles, that nothing is now needed but increased facilities to smooth the path

for easy and friendly travel on business, health, and pleasure between the two countries.

"The new lines of steam communication afford daily means of transit, and it is a great profit and advantage to Cuba to have the free expenditure by United States citizens and travelers made in that island. The purchases of these numerous visitors are very large, and can be greatly increased.

"This aspect of the subject may not be unworthy of note, as supplementing the evident benefits which must flow from the neighborly intercourse of the better classes of their citizens. The importance of the latter consideration should not be lost sight of, and it is clearly in the interest of undisturbed intercourse to do all that can be done toward promoting it. No single measure would more assist than the abolition of all laws and regulations requiring the possession of passports by persons landing in the Antilles from the United States.

"Requiring on their part no such documentary evidence from persons landing in the United States from Spain or any of the Spanish dependencies, the United States cannot view the exaction of passports by Spain in the light of reciprocity; but, on the contrary, as a positive discrimination against their citizens, inasmuch as no passports are required in the Antilles of passengers from Europe or the British possessions in North America. Nor is this the only unfavorable treatment in respect of which the Government of the United States conceives it to be its duty to make friendly representations. In respect of the Spanish consular visa attached to a passport (in itself very onerous), it is noticeable that double the charge is made for the authentication of the passports of travelers from the United States than is imposed in the case of the optional visa of the passport of a traveler going to Cuba from Europe, and providing himself with that means of establishing his identity and right to courteous treatment. And still another discrimination appears, for certain foreigners, Germans in particular, going from our ports to Cuba, are favored by the collection of a lower fee for the visa of the Spanish consuls in the United States than American citizens are compelled to pay for the same service. Unreasonable and only applicable to a part of the foreign travel with Cuba, the passport system there is thus made an engine of an unfriendly discrimination. In the interest of both countries, therefore, I propose that passports shall no longer be required as the condition for the landing of persons in the Antilles from the United States.

"No interference is intended with the option of the individual in providing himself with any convenient means of establishing his citizenship and identity. In the event of proof of American citizenship becoming necessary, proper identification can be made, or a passport issued whenever specially required. I draw a distinction between the right of the citizen to obtain from his Government evidence of correlative allegiance and protection and the exaction by a foreign Govern-

ment of such evidence in respect only of the citizens or subjects of a particular country."

Mr. Bayard, Sec. of State, to Mr. de Muruaga, May 19, 1886. MSS. Notes, Spain.

"Referring to my recent instructions concerning the restrictions and discriminations imposed upon travel between the United States and the Antilles, I have to inform you that in a conference with Señor Muruaga, on the 11th instant, he stated that, while the Spanish Government does not think it can wholly abolish passports to Cuba, yet it will relieve citizens of the United States of the present unequal and discriminating charge of $4 for the consular visa, as against the $2 fee for the visa of German and other passports.

"The spirit of this announcement is appreciated, and, as far as it goes, will afford slight relief. The question of national discrimination is broadly involved, and I do not understand Señor Muruaga's declaration as meeting the disfavor shown by demanding from travelers leaving the United States passports which are not required in the case of persons going to Cuba from other countries. My recent note to the Spanish minister has intimated the indisposition to accept as a reason for such discrimination the suggestion he appeared to imply, that residents in the United States are, more than in other countries, a source of peril to peace and order in the Antilles. This Government, of course, objects to any discrimination, no matter in what manner expressed, against its citizens."

Mr. Bayard, Sec. of State, to Mr. Curry, June 14, 1886. MSS. Inst., Spain.

"Passports in the United States can be issued only at the Department of State. In foreign countries they can be issued only by the acting chief diplomatic representative; or in the absence of a diplomatic representative from the country, then by the consul-general, if there be one, or, in the absence of both of the officers last named, by a consul (Form No. 9 of the Consular Regulations). In the colonies of a country a passport may be issued by a consul-general, if there be one; otherwise by a consul. The issue of passports by consular agents is prohibited. Professional titles will not be inserted in passports. A fee equivalent to five dollars in the gold coin of the United States must be charged and collected for each passport granted or issued by a diplomatic agent.

"When an application is made for a passport by a native citizen, before it be granted the applicant must make a written declaration, under oath, stating his name in full, age, and place of birth, supported also, if possible, by the affidavit of a creditable person, to whom the applicant is personally known, and to the best of whose knowledge and belief the declaration is true, and the minister or consul may require such other evidence as he may deem necessary to establish the applicant's citizenship. If the applicant claims to be a naturalized citizen, he shall also produce the original or certified copy of the decree of the court by which he was declared to be a citizen; and it is the duty of the minister or consul, at the close of each quarter, to transmit to the Department a statement of the evidence on which all such passports were issued or granted. The applicant should also, in both cases, be

required to take the oath of allegiance, and the oath should be transmitted to the Department with the quarterly return. A passport issued from this Department, coupled with the proof that the person in whose behalf it is presented is the person named therein, may be taken as *prima facie* evidence of the citizenship of the applicant, within two years from its date.

"When the diplomatic agent is satisfied that an applicant for protection has a right to his intervention, he should interest himself in his behalf, examining carefully into his grievances. If he finds that the complaints are well founded, he should interpose firmly, but with courtesy and moderation, in his behalf."

Printed Pers. Inst. Dip. Agents, 1885.

A passport issued by an unauthorized person substantially in the form used by the State Department is within the letter of section 23 of the act of 1856 (Rev. Stat., § 4078). The prohibition contained in that act is not confined to the issuing and verifying of such passports or certificates in foreign countries, but applies equally to State and Federal functionaries residing here.

9 Op., 350, Black, 1859.

(2) ONLY TO CITIZENS.

§ 192.

"In times of war and internal commotions such passports are often solicited, and sometimes sought by fraudulent means to be obtained, to favor the escape of individuals having no right to such protection, and being in peril of their persons. It is not improbable that attempts of this kind will be made to obtain passports from you. Your vigilance will be exercised in guarding against such impositions, and your firmness in resisting such solicitations. Respect for the passport of an American minister abroad is indispensable for the safety of his fellow-citizens traveling with it; and nothing would be so fatal to that respect as the experience that his passport had been abusively obtained by persons not entitled to it."

Mr. Adams, Sec. of State, to Mr. Allen, Nov. 30, 1823. MSS. Inst., Ministers.

"Your observations on the importance of great care in preventing foreigners from protecting themselves under American passports are very just, particularly in the case of Spaniards who use them to evade the laws of Mexico. In proportion to the care which all our public agents ought to take in giving proper protection to our citizens, ought to be their circumspection in preventing others, not entitled to that privilege, from usurping it. The President therefore highly approves the precautions you have taken in the instances you mention. And you are instructed to use every proper endeavor to convince the Mexican Gov-

ernment of the sincerity of your exertions to detect impositions of this kind in pursuance of what you may assure them is the wish of the President."

Mr. Livingston, Sec. of State, to Mr. Butler, June 26, 1831. MSS. Inst., Am. States.

"A passport is in its terms a certificate of citizenship, and cannot, consequently, with propriety be given to any person not a citizen. Mr. Davis, in his report to you in Lemmi's case, alludes to the passports which were given by Mr. Brown, at Rome, to Italians desirous of escaping after the downfall of the government of Mazzini and his colleagues. Similar passports were given at Constantinople by the American legation to the Hungarian refugees. In these last cases the words 'citizen of the United States' were erased from the passports; but Mr. Davis is not quite sure that the consul at Rome was always equally exact. If he was not, he certainly committed a great error, although no doubt with good intentions. The value of the passport to those entitled to it would soon sink if it were understood that in cases of emergency it could be obtained by those who are not entitled to it; besides the very grave objection that if a passport containing the words 'citizen of the United States' is intentionally given to a person not a citizen, the signature and seal of the representative of the Government are appended to what is known not to be true.

"The objection is but partly met by the erasure of the words. Police officers on the continent seldom understand our language; and they form an opinion of the character of the document by the emblems on the vignette and the seal. If these cease to be reliable indications, they will in the same degree cease to be of value to those who are entitled to them, and passports will be subjected to a closer scrutiny with all the inconveniences of detention till their precise character is ascertained."

Mr. Everett, Sec. of State, to Mr. Ingersoll, Dec. 7, 1852. MSS. Inst., Gr. Brit.

"The impropriety of any of our legations granting passports to foreigners, under any circumstances, even with the omission of the clause asserting citizenship, and merely asking for the bearer liberty to pass freely, is obvious, for, as this Department possesses the faculty of granting passports to *bona fide* citizens of the United States only, and as a passport is merely a certificate of citizenship, it follows, as a matter of course, that no representative of the United States can, with propriety, give a passport to an alien.

"Further, if an alien has become domiciled in the United States, or declared his intention to become an American citizen, he is not entitled to a passport declaring him to be a citizen of the United States. Both of these classes of persons, however, may be entitled to some recognition by this Government. The most that can be done for them by the

legation is to certify to the genuineness of their papers, when presented for attestation, and when there can be no reasonable doubt of their being authentic; and to this simple certificate that to the best of the belief of the legation the documents in question are genuine, the European authorities are at liberty to pay such respect as they think proper."

Mr. Marcy, Sec. of State, to Mr. Jackson, Sept. 14, 1854. MSS. Inst., Austria. See *infra*, § 193.

"In all cases where indubitable evidence of citizenship, either native or naturalized, is presented to the legation by persons temporarily domiciled in the countries to which you are accredited, or in transit through them, either a certificate of citizenship or a passport, as the circumstances may require, may be furnished to them by the legation. * * *

"Instances have occurred, and it is not improbable that they may again be presented, in which citizens of the United States who had resided abroad for so long a time, and had formed connections, either of a commercial or family nature, so intimate and binding as to render them, as far as they could be without a formal renunciation of their allegiance to the United States, citizens or subjects of the country in which they have been domiciled, have sought the protection of this Government, and claimed the privileges of its citizens when danger has threatened or when violence has attacked their persons or their interests. Such claims would, of course, be entitled to consideration, but the Government would require to be fully satisfied that citizenship had not at any time been disclaimed or abandoned for selfish purposes before it would feel bound to demand redress for such claimants. Interposition in such cases would be extended as a matter of grace, and not of right.

"It may not be amiss in this communication to anticipate the consideration of cases of much more frequent and probable occurrence. That is, when you are solicited to extend a certificate of citizenship or to furnish a passport to such persons as have made formal declarations before the competent authorities of the United States, of their *intentions* to become citizens, but who have not been legally naturalized.

"As this Department grants passports only to *bona fide* citizens of the United States, and as a passport is nothing more than a certificate of citizenship, it follows, necessarily, that you can, with propriety, give a passport neither to an alien who may have become domiciled in the United States nor to a foreigner who has merely declared his intention to become an American citizen, although both of these classes of persons may be entitled to some recognition by this Government. The most that can be done by you is to certify to the genuineness of their papers when presented for your attestation, and when you have no reasonable doubts of their authenticity. The authorities of foreign states may pay such respect to these documents as they may think

proper. The verification which should be placed upon the back of the certificate might be in these words:

"'LEGATION OF THE UNITED STATES
"'AT ——.

"'I hereby certify that, according to the best of my knowledge and belief, the within document is genuine.

{SEAL OF THE LEGATION.} "'J. A. P.'"

Mr. Marcy, Sec. of State, to Mr. Peden, Apr. 10, 1856. MSS. Inst., Arg. Rep.

"It is clearly the duty of the Secretary of State not to authorize passports to be 'granted, issued, or verified in foreign countries by diplomatic or consular officers of the United States to or for any other persons than citizens of the United States.' If this law apparently operates harshly upon persons who, by reason of their declaration of intention to become citizens of the United States, suppose themselves entitled to the protection of its representative abroad, it is for the law-making power to determine whether it is wise to change the policy which has so long been established. While the law remains as it is, I can see no 'official' protection which can be extended to persons who are not citizens of the United States. The granting of an official certificate of protection, by an officer of the Government who is authorized to issue such certificates, implies a committal of the Government in advance to enforcing that protection by official interference and by other acts which may eventually lead to the employment of force. This consideration, taken in connection with the clear provisions of law in that respect and with the well-defined policy of the law, induced the Department to issue the circular of October last, prohibiting the granting of passports to any but citizens of the United States."

Mr. Fish, Sec. of State, to Mr. Washburne, Oct. 4, 1870. MSS. Inst., France. See Mr. Fish, Sec. of State, to Mr. Boker, Apr. 19, 1872. MSS. Inst., Turkey; For. Rel., 1872.

A passport will not be granted to a naturalized citizen who may be inferred, from long residence abroad and other circumstances, to have abandoned his nationality.

Mr. Fish, Sec. of State, to Mr. Lockwood, Oct. 27, 1874. MSS. Dom. Let. See Mr. Fish to Mr. Ehrenbacker, June 5, 1875; *ibid.* See *supra*, §§ 176 *ff.*

"I am of the opinion that any citizen of the United States has a right to be furnished with such evidence of citizenship, and of his right to the protection of his Government, as has been adopted for that purpose, upon complying with the usual regulations, and that the necessity therefor is a matter for the judgment of the party himself. A passport duly issued is the usual evidence of citizenship in a foreign land.

"It would therefore seem that the desire of a naturalized citizen to be supplied with the usual evidence of his nationality, in case he be called upon for military service, is natural and entirely allowable."

Mr. Fish, Sec. of State, to Mr. Davis, Jan. 14, 1875. MSS. Inst., Germ.

"According to the rules in force in general in the Department respecting the issue of passports, separate passports are issued to a father and his two children on a request therefor, or where reasonable cause is shown. In fact, the practice of including several members of the same family in one passport is to save trouble and expense to the parties themselves.

"Where good cause is shown therefor, such as the intended residence of one of a family in a foreign land, or a necessity for the use of a passport for a proper purpose, it would seem that the passports might well be issued on making proper application therefor and complying with the usual regulations."

Mr. Fish, Sec. of State, to Mr. Davis, Nov. 4, 1876. MSS. Inst., Germ.

"Rau, born of naturalized parentage, in Kansas, is taken to Europe while a minor, marries, and establishes himself in Switzerland; not in the country (Würtemberg) whence his father emigrated. Upon his applying to you for a passport as an American citizen, you required his definite declaration of intention to return to the United States within some certain time, basing your requirement on the ground that, under the circumstances of Rau's birth and residence during minority, his indefinite residence abroad, without evident intent to return, amounts to self-expatriation.

"The proper officers of the Department have given every attention to the case, both as reported by you, and upon the appeal and documentary evidence submitted by Mr. Rau.

"It is conceived that, in applying to his case the doctrines of repatriation as tantamount under the circumstances to expatriation, you have extended the thesis you advance of Rau's citizenship being due to his father's naturalization beyond the point where it should rightfully rest. For, while there may be rational doubt as to whether Rau is a *good* citizen of the United States, sharing alike the burdens and privileges of his fellow-citizens, he is still undoubtedly a *citizen*. Having been born here, of a naturalized father, the question of repatriation would not obtain in his case, even if he were permanently domiciled in Würtemberg, his father's place of nativity. The Department holds that for a native American to put off his national character he should put on another. Continued residence of a native American abroad is not expatriation, unless he performs acts inconsistent with his American nationality and consistent only with the formal acquirement of another nationality, and the same rule holds equally good in the case of a naturalized citizen of the United States who may reside abroad otherwhere than in the country of his original allegiance. Existing statutes confirm the principle by providing that citizenship shall flow to the children of American citizens born abroad, the birthright ceasing only with the grandchildren whose fathers have never resided in the United States. Foreign residence, even for two generations, is, therefore, not neces-

sarily expatriation, in the sense of renouncing original allegiance, nor is it necessarily repatriation unless through the conflict of laws of the respective countries and the conclusion of conventional agreements between them.

"If, therefore, Mr. Rau shall make application in the usual form, fortified by affidavit and documentary evidence of his American birth, and shall show that he has not forfeited his native allegiance by assuming another, the Department conceives that he is entitled to a passport for himself and wife.

"The application of Mr. Rau to this Department, through the Hon. J. W. Stone, M. C., of Michigan, was in the nature of an appeal from your action in his regard, coupled with a request that a passport should issue to him directly from the Department. The rule which has been enforced for some years is that 'citizens of the United States desiring to obtain passports while in a foreign country must apply to the chief diplomatic representative of the United States in that country.' There is no good reason why that rule should not be applicable now, or why action should be taken here which might imply reversal of your decision. The Department prefers to regard you as not having refused a passport to Mr. Rau, but, rather, as having, through commendable zeal in the furtherance of true American interests abroad, required of the applicant a declaration not technically necessary, either in view of his birthplace or present country of residence."

Mr. Evarts, Sec. of State, to Mr. Fish, Oct. 19, 1880. MSS. Inst., Switz.; For. Rel., 1880.

A naturalized citizen of the United States who returns to his country of origin, and there marries, settles, and remains twenty years, is not entitled to a passport as a citizen of the United States.

Mr. Blaine, Sec. of State, to Mr. Kassen, Mar. 31, 1881. MSS. Inst., Austria. *Supra*, § 176 *ff.*

When an Austrian subject, after being naturalized in the United States, returns to his country of origin on a passport dated June 17, 1881, and there resides four years, and then applies for a new passport, such passport "ought not to be granted without proof that this residence was meant by him to be temporary and exceptional," and in such case it would be proper that the applicant should be personally examined.

Mr. Bayard, Sec. of State, to Mr. Lee, Oct. 2, 1885; *ibid.*

"As your archives will show, and as you are doubtless aware, in August, 1879, this Government sent circular instructions to all our ministers abroad to request all proper assistance from the Governments to which they were accredited in suppressing the proselyting for the Mormon church. In the face of such a circular it would seem to be inconsistent to issue passports to persons who are undoubtedly Mormon emis-

saries, even if they are American citizens. The law as to issuing passports is permissory, not obligatory, and the decision is left with the Secretary of State, under section 4075 of the Revised Statutes. Inasmuch as polygamy is a statutory crime, proselytism with intent that the emigrants should live here in open violation of our laws would seem to be sufficient warrant for refusing a passport. But it would be well to have the fact of the applicant for the passport being a Mormon emissary, and actually engaged in proselyting, conclusively proved to your satisfaction by some kind of evidence which can be put on the files of your legation and this Department. This might be obtained, perhaps, from the police authorities or the public press in case any meetings were held for the object of inciting to emigration. It is noticed that in your report of the case you did not give the applicant's name. It would be as well to obtain in all such cases of refusal of passport application, a detailed statement from the applicant, duly signed and sworn to, in support of his application, a copy of which can then be forwarded to this Department for its action and to refer to in case the application is renewed here."

Mr. Bayard, Sec. of State, to Mr. Magee, Nov. 3, 1885. MSS. Inst., Sweden.

"Passports are to be issued only to citizens of the United States, and are to be numbered, commencing with No. 1, and so continuing consecutively until the end of the incumbent's term of office. For a diplomatic or consular officer to issue a passport to a person not a citizen of the United States is a penal offense punishable on conviction by imprisonment not exceeding one year, or by a fine not exceeding $500, or both. Persons who have merely declared their intentions to become citizens are not in the full sense citizens of the United States within the meaning of the law. Provided, that nothing herein contained is to be construed as in any way abridging the right of persons domiciled in the United States, but not naturalized therein, to maintain internationally their status of domicile and to claim protection from this Government in the maintenance of such status."

Printed Pers. Inst., Dip. Agents, 1885. See 9 Op., 350, Black, 1859.

"When an application is made for a passport by a native citizen, before it be granted the applicant must make a written declaration under oath, stating his name in full, age, and place of birth, supported also, if possible, by the affidavit of a creditable person, to whom the applicant is personally known, and to the best of whose knowledge and belief the declaration is true, and the minister or consul may require such other evidence as he may deem necessary to establish the applicant's citizenship. If the applicant claims to be a naturalized citizen, he shall also produce the original or certified copy of the decree of the court by which he was declared to be a citizen; and it is the duty of the minister or consul, at the close of each half year, to transmit to the Department a statement of the evidence on which all such passports were issued or granted. The applicant should also, in both cases, be required to take the oath of allegiance, and the oath should be transmitted to the Department with the half-yearly return. A passport issued from this Department, coupled with the proof that the person in whose behalf it is presented is the person named therein, may be taken as *prima*

facie evidence of the citizenship of the applicant, within two years from its date.

"It is understood that persons present themselves in some foreign countries to the diplomatic or consular representatives of this Government with certificates of citizenship issued by a local or municipal officer, such as the mayor of a city, or a notary public, with a view to be registered as American citizens, that they may travel under the protection of such certificates. The laws of the United States permit the Secretary of State alone to grant or issue passports in the United States, and prohibit all persons 'acting, or claiming to act, in any office or capacity under the United States or any of the States of the United States, who shall not be lawfully authorized so to do,' from granting or issuing 'any passport or *other instrument in the nature of a passport*, to or for any citizen of the United States, or to or for any person claiming to be, or designated as such, in such passport or *verification*.' Such certificates, therefore, have no legal validity, and are not to be recognized. An instrument issued by an unauthorized person substantially in the form used by the Department of State is within the letter and intent of the prohibition of the statute. It is not material whether such instruments are issued in foreign countries or in the United States, and the prohibition applies equally to State, municipal, or Federal officers.

"When the applicant for a passport is accompanied by his wife, minor child, or servants, it will be sufficient to state in the passport the names of such persons, and their relationship to or connection with him. A separate passport must be issued for each person of full age, not the wife or servant of another, with whom he or she is traveling.

"It is provided by law that 'all children born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were were or may be, at the time of their birth, citizens thereof, are to be declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.' That the citizenship of the father descends to the children born to him when abroad, is a generally acknowledged principle of international law.

"It is further provided by law that any woman (who might lawfully be naturalized under the existing laws), married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen. The recognition of this citizenship will be subject to the qualification above referred to. It is also provided (Rev. Stat., § 2168) that when any alien who has made declaration, dies before he is actually naturalized, the widow and children of such alien shall be considered as citizens of the United States upon taking the oaths prescribed by law."

Printed Pers. Inst. Dip. Agents, 1885. See *supra*, § 183.

The following general instructions in regard to passports were issued by the Department of State of the United States on May 1, 1886:

"Citizens of the United States, visiting foreign countries, may be liable to inconvenience if unprovided with authentic proof of their national character. This may be avoided by a passport from this Department, certifying the bearer to be a citizen of the United States. Passports are issued only to citizens of the United States, upon application supported by proof of citizenship.

"Citizenship is acquired by nativity, by naturalization, by descent, and by annexation of territory. (13 Op. Att'y Gen., 397.) An alien woman, who marries a citizen of the United States, thereby becomes a citizen. Minor children, resident in the United States, become citizens by the naturalization of their father. Children born abroad to citizens of the United States partake of their father's nationality.

"When the applicant is a native citizen of the United States he must transmit his own affidavit of this fact, stating his age and place of birth, with the affidavit of one other citizen of the United States to whom he is personally known, stating that the declaration made by the applicant is true. These affidavits must be attested by a notary public, under his signature and seal of office. When there is no notary in the place, the affidavits may be made before a justice of the peace or other officer authorized to administer oaths; but if such officer has no seal, his official act must be authenticated by certificate of a court of record.

"A person born abroad, who claims that his father was a native or naturalized citizen of the United States, must state in his affidavit that his father was born or naturalized in the United States, has resided therein, and was a citizen of the same at the time of the applicant's birth, and that the applicant intends to reside in the United States. (13 Op. Att'y Gen., 89.) This affidavit must be supported by that of one other citizen acquainted with the facts.

"If the applicant be a naturalized citizen, his certificate of naturalization must be transmitted for inspection (it will be returned with the passport), and he must state in his affidavit that he is the identical person described in the certificate presented.

"Passports cannot be issued to aliens who have only declared their intention to become citizens.

"Military service does not of itself confer citizenship. A person of alien birth, who has been honorably discharged from military service in the United States, but who has not been naturalized, should not transmit his discharge paper in application for a passport, but should apply to the proper court for admission to citizenship, and transmit a certified copy of the record of such admission.

"In issuing passports to naturalized citizens, the Department will be guided by the naturalization certificate; and the signature to the application and oath of allegiance should conform in orthography to the applicant's name as written in the naturalization paper.

"The wife or widow of a naturalized citizen must transmit the naturalization certificate of the husband, stating in her affidavit that she is the wife or widow of the person described therein.

"The children of a naturalized citizen, claiming citizenship through the father, must transmit the certificate of naturalization of the father, stating in their affidavits that they are children of the person described therein, and were minors at the time of such naturalization.

"The oath of allegiance to the United States will be required in all cases.

"The application should be accompanied by a description of the person, stating the following particulars, viz:

"Age: years. Stature: feet, inches (English measure). Forehead: . Eyes: . Nose: . Mouth: . Chin: . Hair: . Complexion: . Face: .

"If the applicant is to be accompanied by his wife, minor children, or servants, it will be sufficient to state the names and ages of such persons and their relationship to the applicant, when a single passport for the whole will suffice. For any other person in the party, a separate passport will be required. A woman's passport may include her minor children and servants. Though separate passports may be granted to different members of a family when good cause is shown therefor, separate passports must, in every case, be granted for adult children.

"By act of Congress, approved June 20, 1874, a fee of five dollars is required to be collected for every citizen's passport. That amount should accompany each application. Postal money orders and bank checks should be payable to the disbursing clerk of the Department of State. Checks to be available for the full amount must be drawn on banks at principal business centers. Individual checks must be certified by the banks upon which they are drawn.

"A passport is good for two years from its date and no longer. A new one may be obtained by stating the date and number of the old one, paying the fee of five dollars, and furnishing satisfactory evidence that the applicant is at the time within the United States. The oath of allegiance must also be transmitted when the former passport was issued prior to 1861.

"Citizens of the United States desiring to obtain passports while in a foreign country must apply to the chief diplomatic representative of the United States in that country, or, in the absence of a diplomatic representative, then to the consul-general, if there be one, or, in the absence of both the officers last named, *to a consul*. A naturalized citizen so applying abroad must state under oath that his absences since his naturalization have been such as not to work an abandonment of his nationality and that he expects to return to the United States as his domicile and final abode.

"Passports cannot be lawfully issued by State authorities, or by judicial or municipal functionaries of the United States (Rev. Stat., § 4075), and it is made a penal offense for unauthorized persons to grant any passport or other instrument in the nature of a passport.

"To persons wishing to obtain passports for themselves, blank forms of application will be furnished by this Department on request, stating whether the applicant be a native or a naturalized citizen. Forms are not furnished, except as samples, to those who make a business of procuring passports.

"Communications should be addressed to the Department of State, indorsed 'Passport Division,' and each communication should give the post-office address of the person to whom the answer is to be directed.

"Professional titles will not be inserted in passports.

"The issuing of passports is at the discretion of the Secretary (Rev. Stat., § 4075), and they will not be granted to persons engaged in violation of the laws of the United States, *e. g.*, Mormon propagandists.

"The refusal to grant a passport except on proof of citizenship, is not to be regarded as inconsistent with the position that the Department will extend to persons domiciled in the United States, though not citizens, such rights as belong to them by international law."

Where application was made to the Department of State for passports for five persons residing in the island of Curaçoa, four of whom were born in that island and one in the island of Saint Thomas, and all of whom were children of native citizens of the United States, but it did not appear that any of the applicants had ever resided or intended to reside in the United States, it was advised that the applicants are not entitled to passports.

13 Op., 89, Hoar, 1869.

Where persons born abroad claim passports as citizens of the United States, founded on an alleged Texan citizenship at the time of annexation, they may be deemed citizens of the United States and entitled to passports as such should they be found to belong to any of the classes of Texas citizens made citizens of the United States under the statute of annexation.

13 Op., 397, Akerman, 1871. See *supra*, §§ 4 *ff*, 187 *ff*.

The laws of the United States authorize the issue of passports to all citizens thereof, without distinction, whether native-born or naturalized.

15 Op., 114, Taft, 1876.

(3) Qualified passports and protection papers.

§ 193.

"With respect to the certificates of courts of justice in favor of persons who have declared their intention to become citizens, the case is in some degree different. They have taken the preliminary step towards naturalization, and seem to be entitled to some recognition of that step. While you cannot grant them passports as citizens, there is no impropriety in authenticating their certificates by the usual countersign. It will be for the European powers to pay such respect to the document as they think proper. The passport itself is but a request to foreign Governments to allow the bearer to enter and pass through their dominions, and urgent reasons of state warrant them in refusing to do so. No just offense could be taken by the United States if the certi-

ficates in question should prove of little value to the holders. In all common cases, however, they would probably prove as valuable as passports; and as those who obtain them have disabled themselves from procuring passports from their own Governments, they seem to have some claim to all the aid in this way which we can with propriety give them."

Mr. Everett, Sec. of State, to Mr. Ingersoll, Dec. 21, 1852. MSS. Inst., Gr. Brit. See Mr. Marcy, Sec. of State, to Mr. Jackson, Sept. 14, 1854, quoted *supra*, § 192.

"If he goes abroad with papers showing that he has declared his intention to become a citizen of the United States, and presents them to our ministers, they are required, if they think the documents genuine, to make an indorsement on them to that effect unless such ministers have reason to believe that such intention has been abandoned. If a person has been here and declared his intention to become a citizen, and afterwards leaves this country, goes to another and there takes up his permanent abode, his connection with the United States is dissolved, and consequently his intention to become a citizen of thereof must be adjudged to have been abandoned. By such a course of conduct his previous declaration ceases to be available for any purpose whatever; and our ministers and functionaries abroad would not be warranted in such a case to do any act to give it effect. * * *

"Where a person with a fair intent has made his declaration and goes abroad for a purpose not inconsistent with the object of that declaration, and our ministers have certified to the genuineness of the evidence he takes with him of that fact, this Government has done all that can be required or reasonably expected of it in such a case. I do not see what more it can do for the person so situated in case other Governments refuse to give the same effect to such papers as they usually give to regular passports in the hands of one of our citizens."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Apr. 13, 1854. MSS. Inst., Gr. Brit.

"This Government cannot rightfully and does not claim from foreign powers the same consideration for a declaration of intention to become a citizen, as for a regular passport. The declaration, indeed, is *prima facie* evidence that the person who made it was at its date domiciled in the United States, and entitled thereby, though not to all, to certain rights of a citizen, and to much more consideration when abroad than is due to one who has never been in our country; but the declarant not being a citizen under our laws, even while domiciled here, cannot enjoy all the rights of citizenship either here or abroad. He is entitled to our care, and in most circumstances we have a right to consider him as under our protection, and this Government is disposed and ready to grant him all the benefits he can or ought to receive in such a situation. If such individual, however, afterwards leaves this country, goes to another,

and there takes up his permanent abode, his connection with the United States is dissolved, and his intention to become a citizen must be considered to have been abandoned. Under the circumstances the previous declaration ceases to be available for any purposes whatever. But when a person, with a fair intent, has made his declaration, and goes abroad for any purpose not incompatible with the objects of the declaration, and the legation has certified to the genuineness of his papers, the Government of the United States has done all that can be required or reasonably expected, and can have no just cause of complaint if other Governments see fit to refuse to give the same effect to such papers as they usually give to regular passports in the hands of our citizens."

Mr. Marcy, Sec. of State, to Mr. Seibels, May 27, 1854. MSS. Inst., Belgium. See to same effect Mr. Marcy, Sec. of State, to Mr. Clay, Dec. 28, 1854. MSS. Inst., Peru.

"Even though an alien or foreigner may have become domiciled in the United States, or may have declared his intention to become an American citizen, he is not entitled to a passport declaring him to be an American citizen, although both of these classes of persons may be entitled to some recognition by this Government. The most that can be done by you for them, however, is to certify to the genuineness of their papers when presented for your attestation, and when you have no reasonable doubts of their authenticity. And to this simple certificate, that, to the best of your belief, the documents in question are genuine, the European authorities are at liberty to pay such respect as they think proper."

Mr. Marcy, Sec. of State, to Mr. Fay, May 27, 1854. MSS. Inst., Switz. Similar instructions were sent to other of our representatives abroad at about this time. See Mr. Marcy, Sec. of State, to Mr. Peden, Apr. 10, 1856. MSS. Inst., Arg. Rep., quoted *supra*, § 192.

"As this Department grants passports to citizens of the United States only, it certainly recognizes in its representatives abroad no authority to grant them to such as are not citizens. At the same time, it does not deny to them the right of extending a certain degree of protection to those possessing only the inchoate rights of citizenship. The nature and extent of this protection, however, must depend in a great degree upon circumstances; and these will vary with almost every case. Thus a foreigner who comes to this country and, renouncing all allegiance to any other power, declares his intention of becoming a citizen, and afterwards returns to the country of his birth for a temporary purpose only, not losing his domicile here, is clothed with a nationality which entitles him to a greater degree of protection than could properly be extended to one who, as in the case of Mr. W., after declaring his intention to become a citizen of the United States, shortly after departs therefrom, and remains abroad a sufficient length of time to warrant the belief

that he has either abandoned that intention or is indifferent about carrying it into effect."

Mr. Marcy, Sec. of State, to Mr. Vroom, July 7, 1854. MSS. Inst., Prussia.
As to privileges of domicil, see *infra*, § 198.

"Passports are the only 'protection papers' known in the law, or sanctioned in this Department. What are technically called 'protection papers' are used in our international intercourse with uncivilized nations. Protection papers are a feature in the principle of asylum, which we maintain with barbarous or semi-civilized states, but nowhere else."

Mr. Seward, Sec. of State, to Mr. Asboth, Mar. 27, 1867. MSS. Inst., Arg. Rep.
See instructions of Mr. Cass, Aug. 18, 1858. MSS. Inst., Barb. Powers.

Special passports, accompanying letters of introduction to the diplomatic representatives of the United States, may be issued in special cases.

Mr. Evarts, Sec. of State, to Mr. Key, Apr. 18, 1879. MSS. Dom. Let.

The meaning and interpretation of section 163, Consular Regulations, "seems very plain and obvious. In cities or towns in Germany where, for purposes of identification, sojourning foreigners are required by the local laws or municipal regulations to deposit their passports with the police or other local authorities, as is understood to be the case in Hamburg, Berlin, and generally in cities and towns throughout Germany, 'a consular certificate may be granted setting forth the facts *as appearing from the passports*, but only with a view of complying with the law or regulation.'

"The person seeking such certificate there must present to the consul a passport, and the passport must not be over two years old. The certificate should be confined in its statements to 'the facts appearing from the passport.' It should also state the time at which it (the certificate) will cease to be effective, which time is to be limited by the date at which the passport will be two years old, and it should also state expressly and explicitly that it is only to be used in the locality where it is issued, and there only for the purpose of compliance with the local laws and regulations of such locality. Moreover, in no case is such consular certificate to take the place of or to be used in lieu of a passport."

Mr. Frelinghuysen, Sec. of State, to Mr. Sargent, July 26, 1883. MSS. Inst., Germ.

"The habit, therefore, of obtaining transit passes by American citizens for Chinese principals, to secure for them advantages to which they are not entitled by the laws of their own country, is such an abuse of the privilege as not only to justify the Chinese authorities in refusing to recognize such passes when irregularly issued or obtained, but also in declining to grant additional ones to those found guilty of such practices."

Mr. Frelinghuysen, Sec. of State, to Mr. Young, Aug. 8, 1884. MSS. Inst., China.

"The British treaty of 1858 provides that 'British subjects may travel for their pleasure or for purposes of trade to all parts of the interior, under passports, which will be issued by their consuls and countersigned by the local authorities.'

"Now these so-called passports, issued under the British treaty (which we under the most-favored-nation clause have a right to invoke), are not passports in the international sense, but local certificates or passes granting permission to the bearer thereof to go into the interior from the treaty port where they were issued.

"These certificates derive their validity from joint issuance by the consul and the local Chinese authority, but the initiative in issuing them belongs to the consul, and the Chinese cannot refuse to countersign them.

"These certificates are moreover not merely temporary and local, but are limited to the particular journey to be undertaken in China. When the specified time expires, or the journey is performed, the certificate loses validity and another must be issued if the bearer wishes to continue in the interior or make another journey thither.

"All this points to an instrument which supplements an ordinary general passport which every nation has the independent right to issue to its subjects and which other nations may disregard at their peril.

"The Chinese certificates are at the most merely transit passes.

"We have, however, decided many times that no such pass or certificate, which carries on its face recognition of the bearer's nationality, can be issued in lieu of a regular passport as prescribed by statute.

"It is not, however, to be expected that an American citizen is to be required to take out a new passport every time he journeys more than 30 miles inland from a treaty port, and be compelled to pay $5 each time.

"The true solution would seem to be to provide for the issuance by the consuls of a form of limited-transit certificates, but only on presentation of a passport previously issued by the legation, or upon filing a duly attested application for a passport with evidence of citizenship accompanied by the legal fees."

Mr. Frelinghuysen, Sec. of State, to Mr. Young, Jan. 19, 1885. MSS. Inst., China.

"This Department has received a dispatch of the 20th ultimo, from the United States consul at Beirut, stating that the Turkish bureau of nationality at Constantinople, had recently declined to certify to the American citizenship of Messrs. K. G. and B., on the ground that their passports did not show that they left the Ottoman Empire prior to the promulgation of the law of 1869, forbidding Turkish subjects to leave the country without permission to become naturalized in another country. The refusal referred to, for the reason alleged, seems so extraordinary, at least, that you will protest against it, and endeavor to have it corrected so far as it may have been or may be applied to the persons above referred to.

"Passports are issued by this Department to naturalized citizens upon the production of the certificate of naturalization. There is no law of the United States requiring a passport to state when a naturalized citizen left the country of his birth, or to embody that statement in the passport. It has not been the practice of this Department to insert such a statement in the passports issued to former Turkish subjects or to any other naturalized citizens. A different course might imply that the right of the foreign Government to participate in or to make the naturalization of its subjects conditional was acknowledged here. This it has never been and probably never will be.

"The Turkish law referred to also seems to be defective or ambiguous, inasmuch as it assumes that every Ottoman subject who leaves his native country has an intention to become naturalized elsewhere. If this be the meaning of the law, it must be contrary to facts of daily occurrence in that Empire. It may be that Turks, in proportion to their number, do not travel as much as inhabitants of other countries. Still, it is believed that comparatively few of those who do go abroad leave home for the purpose of changing their nationality."

Mr. Bayard, Sec. of State, to Mr. Emmet, May 29, 1885. MSS. Inst., Turkey; For. Rel., 1885.

Where the object is to obtain a passport for an insane person, the application may be made and proper papers presented by the guardian or nearest friend of the person in question. "Even were this not the case, the regulations in regard to issuing passports are not imposed by Congress, but are discretionary with the Executive, and may at any time be interpreted or modified by the Department of State. They should certainly not be applied in such a way as to exclude from a passport persons by whom it may be most needed, as in the present case."

Mr. Porter, Acting Sec. of State, to Mr. Winchester, Sept. 14, 1885. MSS. Inst., Switz.; For. Rel., 1885.

"Complaints have from time to time reached the Department of State of the issue of passports, or papers in the nature of passports, by consular officers, when prohibited from doing so. In future it will be required that diplomatic officers shall make, in addition to the return hereinafter prescribed, a semi-annual return of passports to the Department, showing each passport issued by consular officers in any form which may have been presented to them for visi or otherwise. This report will embrace the name of the person to whom the passport was issued, whether such person is a citizen by birth or naturalization, the date of issue, the name and title of the consular officer issuing the same, the form of the passport or paper, and also the several visas thereon, the dates thereof, and the names of the officers making the same.

"Certificates are sometimes issued by consular officers in countries where there is a diplomatic representative, attesting the identity of the persons to whom they are granted, to be used in the place of regu-

larly issued passports for the purposes of travel or local protection. In countries where the local laws or regulations require the deposit of a passport during the temporary sojourn of a traveler, a consular certificate setting forth the facts as appearing from the passport, may be granted, but only to comply with the requirements of the local law or regulation. Certificates in the nature of passports, and to be used as such, are wholly unauthorized.

"Applications have sometimes been made to the diplomatic and consular officers of the Government for the issue of certificates of citizenship to persons residing in foreign lands and claiming to be American citizens. Hereafter no certificates will be issued, except in the form of passports under the regulations herein prescribed, unless a different form be prescribed by the laws of the country in which the legation or consulate is situated, in which case the diplomatic representative or consul will transmit to the Department a copy of the prescribed form. To protect the dignity of such citizenship, and to guard against fraudulent assumption of it, ministers and consuls will be strict in the observance of the rules herein laid down, and will exercise caution in issuing passports to applicants. When their intervention is invoked on behalf of citizens of the United States residing in foreign countries agents of the Government will be careful to remember that it is as incumbent on such persons as it is upon the citizens or subjects of those foreign countries to observe the reasonable laws of the state in which they reside.

"Abuses which have heretofore occurred in granting protection from the local authority in eastern countries, and especially in the Turkish dominions, to persons who, in the opinion of this Department, had no claim thereto, render it advisable that the legations and consulates there should, once in six months, report the number, names, and occupations of the persons to whom, during the six months preceding, such protection may have been given, or by whom it may have been claimed. Such report will in future be expected to be made at the beginning of every January and July. It is believed that sound policy dictates the utmost scrutiny and caution in extending the protection of this Government to any persons abroad not citizens of the United States. This policy, scrupulously adhered to, is apt to afford more efficient protection to those to whom it is really due. Such protection should in no event be given to aliens not actually in discharge of official duty under the direction of the respective diplomatic agents and consular officers or employed in their domestic service, or when it will operate to screen the holder from prosecution for offenses against the laws of the country, or when reasonable ground exists for objection by the Government. No instrument in the nature of a passport should be issued to aliens thus protected; it will be sufficient to grant, when necessary, a certificate setting forth their relation and duties in connection with the legation or consulate."

Printed Pers. Inst. Dip. Agents, 1885; see also U. S. Cons. Reg., 1881, §§ 161 *ff.*

There is no law authorizing the Secretary of State to furnish the owners of an American merchant vessel with a letter of safe-conduct to the American ministers and naval officers in the East

12 Op., 65, Stanbery, 1866.

As to sea-letters, see *infra*, § 408.

(4) VISAS, AND LIMITATIONS AS TO TIME.

§ 194.

"It has been brought to the knowledge of this Department that many of the consuls of foreign Governments residing in the United States, are in habit of attaching their visé to passports of citizens of the United States which have been issued more than a year. As the regulation of this Department, made pursuant to law, requires that a new passport shall be taken out by every citizen of the United States whenever he or she may leave the country, and that every passport to be valid, must be renewed, either at this Department, or at a legation or consulate of the United States, at the expiration of one year from its date, and that a revenue tax of five dollars shall be paid on each passport at the time at which it shall be issued or renewed, it is essential to the protection of the revenue due from this source that foreign consuls should abstain from attaching their visé to passports which have been used on a former absence of the holder from the United States or which are a year or more old when presented for visé."

Mr. Fish, Sec. of State, to Mr. Thornton, May 9, 1870. MSS. Notes, Gr. Brit.

"Upon that subject I have to inform you that applicants at the Department are uniformly advised that a passport is good for two years from its date, and no longer; and that persons applying to an American representative abroad will be required to furnish satisfactory evidence that they are still entitled to protection as citizens of the United States. It is considered that indefinite residence abroad might be quite as much encouraged by the possession of a passport good for an indefinite period, as by the operation of the rule which forces the party to submit his case anew to the careful scrutiny of the legation as often as once in two years, with suitable evidence bearing upon his claim to continued protection."

Mr. Evarts, Sec. of State, to Mr. Everett, Feb. 5, 1878. MSS. Inst., Germ.

The paragraph of our Consular Regulations which provides that no visa will be attached to any passport after two years from its date, is a matter purely municipal, and does not necessarily abrogate such passports when renewal could not be had.

Mr. Evarts, Sec. of State, to Mr. Fish, Dec. 18, 1878. MSS. Inst., Switz.

While the right of foreign Governments to require passports from citizens of the United States is not disputed, the frivolous exaction of taxes on visas, and obstructions in their way by foreign Governments, is a matter of international complaint.

Mr. Frelinghuysen, Sec. of State, to Mr. Forster, March 12, 1884. MSS. Inst., Spain.

"I inclose for your attention a letter dated April 30, 1885, from Mr. H. B. Plant, the president of the Savannah, Florida and Western Railway Company, complaining of the great annoyance and discouragement to the commercial and passenger traffic of the railways leading to the ports on the Gulf of Mexico caused by the system now enforced in Cuba requiring passports to be visaed by a Spanish consul from all persons arriving at a Cuban port. Many of those proceeding there for the first time are ignorant of the necessity of providing themselves with a visaed passport, and discover it only on arriving at the port of embarkation, and often too late to obtain one from Washington. They are, perhaps, also further deterred from pursuing their journey by the heavy fee of $4 exacted for the visé in addition to the first cost of the passport.

"The passport system having been found a serious obstacle to the modern mode of universal and rapid travel, is now practically and tacitly abolished in Europe, except where a military state of siege requires every traveler to be identified and vouched for. It is believed by this Government that our relations with Cuba are so peaceful and intimate that this restriction to trade and travel might now be removed without detriment to the interests of either nation and in fact to their mutual advantage. You are therefore requested to take an early opportunity to lay these views before the minister of foreign affairs, and to propose and urge that a clause should be inserted in the commercial treaty now pending between the United States and Spain abolishing the present system of passports, except possibly at such times when a state of siege or military operations for the national defense might require a more rigorous inspection of travelers arriving at Spanish ports. Should this suggestion be favorably received, you can forward at once to the Department the text of such a clause as drawn up either by yourself or at the Spanish foreign office, with a view, if necessary, to consultation here with the Spanish minister."

Mr. Bayard, Sec. of State, to Mr. Foster, May 6, 1885. MSS. Inst., Spain; For. Rel., 1885.

"Passports are to be verified only by the consular officer of the place where the verification is sought, for which a fee of one dollar in the gold coin of the United States, or its equivalent, will be collected. In the absence of such consular officer, or should the foreign Government refuse to acknowledge the validity of the consular visa, it may be given by the principal diplomatic representative. A diplomatic representative or his secretary of legation may, however, verify passports presented to him when there is no consulate of the United States established in the city where the legation is situated. A consular agent may visa but cannot issue a passport.

"At the close of each quarter, returns are to be made to this Department of the names of and particulars regarding the persons to whom the passport shall be granted, issued, or verified, together with the amount of the taxes or fees collected for the same, which taxes or fees will be

charged on the books of the Treasury against the person receiving them. The fees for visas or passports should be entered and accounted for in the quarterly statement of the agent's account.

"No visa will be attached to a passport after two years from its date. A new passport may, however, be issued in its place by the proper authority, as hereinbefore provided, if desired by a holder who has not forfeited citizenship."

Printed Pers. Inst. Dip. Agents, 1885. See U. S. Cons. Reg., 1881, § 164.

(5) How to be supported.

§ 195.

"A certificate of naturalization and the possession of a passport are presumptive proof, in the absence of other evidence, that the person named therein is a citizen of the United States. If he has not forfeited his right to be so regarded he remains such. The question in each case must be decided by the facts peculiar to it, and should be investigated and decided by the officer to whom the application is made. Where the facts have been investigated and doubt exists, a reference may be made to this Department."

Mr. Fish, Sec. of State, to Mr. Davis, Dec. 22, 1874, MSS. Inst., Prussia.

"The pretension of that Government [Mexico], too, to ignore the passport of this Department, and to require an inspection of the certificate of the naturalization of an alien, cannot be acquiesced in. You will distinctly apprise the minister of foreign affairs to that effect, and will add that this Government will expect to hold that of Mexico accountable for any injury to a citizen of the United States which may be occasioned by a refusal to treat the passport of this Department as sufficient proof of his nationality."

Mr. Evarts, Sec. of State, to Mr. Foster, June 16, 1879. MSS. Inst., Mex.

"The assumption by the Mexican Government of a right to inspect and decide upon the validity of certificates of naturalization issued by these numerous courts in preference to receiving the proofs afforded by a passport of this Department must be regarded as wanting in proper courtesy to the Government of a friendly power.

"It may also be remarked that there are many citizens of the United States who were neither born such or naturalized in the ordinary way. These were naturalized by treaties with foreign powers, and not a few of them by treaties between the United States and Mexico. If these should visit the Mexican Republic, they will have no such certificate of naturalization as is granted to natives of other countries naturalized here. The only guarantee of nationality in their case would be a passport from this Department."

Ibid.

When a passport is gravely impeached, it should be supported, in order to be efficacious, by an adequate certificate of naturalization.

Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, Mar. 28, 1883. MSS. Inst., Switz.

A passport fraudulently obtained will be treated by the Department of State as a nullity.

Mr. Marcy, Sec. of State, to Mr. Jackson, Dec. 7, 1853. MSS. Inst., Austria; *supra*, § 174 *a*.

As a general rule, a passport granted by the Secretary of State is not evidence in a court of justice that the person to whom it was given was a citizen of the United States.

Urtetiqui *v.* D'Arbel, 9 Pet., 692.

When fraud is plainly shown, the Government, or its diplomatic officers, as the case may be, will refuse to acknowledge the validity of the passport.

Supra, § 174*a*.

X. *INDIANS AND CHINESE.*

(1) INDIANS.

§ 196.

Indians, though born within the limits of the United States, are not "citizens" under the fourteenth amendment to the Constitution, since they are not, in a full sense, "subject to the jurisdiction" of the United States.

McKay *v.* Campbell, 2 Sawyer, 119; Karrahoo *v.* Adams, 1 Dill., 344; *Ex parte* Reynolds, 18 Alb. L. J., 8; 15 Am. Law Rev., 21. The international relations of Indians are discussed *infra*, §§ 208 *ff*. See also *supra*, § 183.

(2) CHINESE.

§ 197.

Chinese, also, are not citizens in the contemplation of the fourteenth amendment, since they are not capable of naturalization under our legislation.

Whart. Com. Am. Law, §§ 435, 585; *In re* Ah Yup, 5 Sawyer, 155; State *v.* Ah Chew, 16 Nev., 50, 61.

"Although not accepting as a final decision (not having yet been affirmed by the Supreme Court of the United States) the ruling of Judge Sawyer that Chinese cannot become citizens, the Department 'is constrained, on examination of the laws, to believe that his decision is based on a sound appreciation of the law.' Hence it is advisable that nothing be done in China by its delegates there to commit it to any assertion toward the Imperial Government of the legality of any

act of purported naturalization of a Chinese subject in the United States."

Mr. Evarts, Sec. of State, to Mr. Holcombe, Oct. 29, 1878. MSS. Inst., China.

By the act of May 6, 1882, sec. 14 (22 Stat. L., 61), it is provided "that hereafter no State court or court of the United States shall admit Chinese to citizenship."

As to passports in China, see *supra*, § 193.
As to intervention in China, see *supra*, § 67.
As to treaties with China, see *supra*, § 144.
As to injuries to Chinese, see *infra*, § 226.

A child born in the United States to Chinese parents here residing has been held to be a citizen of the United States.

Look Tin Sing, *in re.*, 10 Sawyer, 353.

If not at the time "subject to the jurisdiction of the United States" they are not citizens (*supra*, § 196. See also *supra*, § 173, last paragraph).

XI. *DOMICIL.*

(1) May give rights and impose duties.

§ 198.

"The general rule of the public law is that every person of full age has a right to change his domicil, and it follows that when he removes to another place, with an intention to make that place his permanent residence or his residence for an indefinite period, it becomes instantly his place of domicil; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period. The Supreme Court of the United States has decided 'that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidences of an intention permanently to reside in that country, as to stamp him with its national character;' and this undoubtedly is in full accordance with the sentiments of the most eminent writers, as well as with those of other high judicial tribunals on the subject. No country has carried this general presumption further than that of the United States, since it is well known that hundreds of thousands of persons are now living in this country who have not been naturalized according to the provisions of law, nor sworn any allegiance to this Government, nor been domiciled amongst us by any regular course of proceedings. What degree of alarm would it not give to this vastly numerous class of men, actually living amongst us as inhabitants of the United States, to learn that by removing to this country they have not transferred their allegiance from the Governments of which they were originally subjects to this Government? And, on the other hand, what would be the condition of this country and its Government, if the sovereigns of Europe, from whose dominions they have emigrated, were supposed to have still a right to interpose to protect such inhabitants against the

penalties which might be justly incurred by them in consequence of their violation of the laws of the United States? In questions on this subject the chief point to be considered is the *animus manendi*, or intention of continued residence; and this must be decided by reasonable rules and the general principles of evidence. If it sufficiently appear that the intention of removing was to make a permanent settlement or a settlement for an indefinite time the right of domicil is acquired by a residence even of a few days."

Report of Mr. Webster, Sec. of State, to the President, Dec. 23, 1851. 6 Webster's Works, 522, 523. (Thrasher's case; see §§ 190, 203, 229, 230, 244, 357.

"Koszta being beyond the jurisdiction of Austria, her laws were entirely inoperative in his case, unless the Sultan of Turkey has consented to give them vigor in his dominions by treaty stipulations. The law of nations has rules of its own on the subject of allegiance, and disregards generally all restrictions imposed upon it by municipal codes.

"This is rendered most evident by the proceedings of independent states in relation to extradition. No state can demand from any other as a matter of right the surrender of a native-born or naturalized citizen or subject, an emigrant, or even a fugitive from justice, unless the demand is authorized by express treaty stipulation. International law allows no such claim though comity may sometimes yield what right withholds. To surrender political offenders (and in this class Austria places Koszta) is not a duty, but, on the contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind. * * *

"Mr. Hülsemann, as the undersigned believes, falls into a great error, an error fatal to some of his most important conclusions, by assuming that a nation can properly extend its protection only to native-born or naturalized citizens. This is not the doctrine of international law, nor is the practice of nations circumscribed within such narrow limits. This law does not, as has been before remarked, complicate questions of this nature by respect for municipal codes. In relation to this subject it has clear and distinct rules of its own. It gives the national character of the country not only to native-born and naturalized citizens, but to all residents in it who are there with, or even without, an intention to become citizens, provided they have a domicile therein. Foreigners may, and often do, acquire a domicil in a country, even though they have entered it with the avowed intention not to become naturalized citizens but to return to their native land at some remote and uncertain period; and, whenever they acquire a domicil, international law at once impresses upon them the national character of the country of that domicil. It is a maxim of international law that domicil confers a national character; it does not allow any one who has a domicil to decline the national character thus conferred; it forces it upon him, often very much against his will and to his great detriment.

International law looks only to the national character in determining what country has a right to protect. If a person goes from this country abroad, with the nationality of the United States, this law enjoins upon other nations to respect him in regard to protection as an American citizen. It concedes to every country the right to protect any and all who may be clothed with its nationality. * * *

"The most approved definitions of a domicil are the following:

"'A residence at a particular place, accompanied with positive or presumptive proof of continuing there for an unlimited time.' (1 Binney's Reports, 349.)

"'If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence of a few days.' (The Venus, 8 Cranch, 279.)

"'Vattel has defined domicil to be a fixed residence in any place, with an intention of always staying there. But this is not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom.' (Story's Con. of Laws, § 43.)

"'A person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidence of an intention permanently to reside there as to stamp him with the national character of the state where he resides.' (The Venus, 8 Cranch, 279.) * * *

"'However, in many cases actual residence is not indispensable to retain a domicil after it is once acquired; but it is retained, *animo solo*, by the mere intention not to change it, or to adopt another. If, therefore, a person leaves his home for temporary purposes, but with an intention to return to it, this change of place is not a change of domicil. Thus, if a person should go on a voyage to sea, or to a foreign country, for health or for pleasure, or for business of a temporary nature, with an intention to return, such a transitory residence would not constitute a new domicil, or amount to an abandonment of the old one; for it is not the mere act of inhabitancy in a place which makes it the domicil, but it is the fact coupled with the intention of remaining there.' (Story's Con. of Laws, § 44.)

"At the very last session of the Supreme Court of the United States a case came up for adjudication presenting a question as to the domicil of General Kosciusko at the time of his death. The decision, which was concurred in by all the judges on the bench, fully sustains the correctness of the foregoing propositions in regard to domicil, particularly the two most important in Koszta's case; first, that he acquired a domicile in the United States; and, second, that he did not lose it by his absence in Turkey. (14 How., 400.)

"As the national character, according to the law of nations, depends upon the domicil, it remains as long as the domicile is retained, and is changed with it. Koszta was, therefore, vested with the nationality of

an American citizen at Smyrna, if he, in contemplation of law, had a domicil in the United States. * * *

"Whenever, by the operation of the law of nations, an individual becomes clothed with our national character, be he a native-born or naturalized citizen, an exile driven from his early home by political oppression, or an emigrant enticed from it by the hopes of a better future for himself and his posterity, he can claim the protection of this Government, and it may respond to that claim without being obliged to explain its conduct to any foreign power, for it is its duty to make its nationality respected by other nations, and respectable in every quarter of the globe.

"This right to protect persons having a domicil, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws, and must discharge the duties they impose on him; his property is in the same way and to the same extent as theirs liable to contribute to the support of the Government. In war he shares equally with them in the calamities which may befall the country; his services may be required for its defense; his life may be periled and sacrificed in maintaining its rights and vindicating its honor. In nearly all respects his and their condition as to the duties and burdens of Government are undistinguishable; and what reasons can be given why, so far at least as regards protection to person and property abroad as well as at home, his rights should not be coextensive with the rights of native-born or naturalized citizens. By the law of nations they have the same nationality; and what right has any foreign power, for the purpose of making distinction between them, to look behind the character given them by that code which regulates national intercourse? When the law of nations determines the nationality of any man, foreign Governments are bound to respect its decision. * * *

"By the laws of Turkey and other Eastern nations, the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates and other European establishments in the East are in the constant habit of opening their doors for the reception of such inmates, who are received irrespective of the country of their birth or allegiance. It is not uncommon for them to have a very large number of such *protégés*. International law recognizes and sanctions the rights acquiesced (*sic:* acquired?) by this connection.

"'In the law of nations as to Europe the rule is that men take their national character from the general character of the country in which they reside; and this rule applies equally to America. But in Asia and Africa an immiscible character is kept up, and Europeans trading under the protection of a factory take their national character from the establishment under which they live and trade. This rule applies to those parts of the world from obvious reasons of policy, because foreigners are not admitted there as in Europe "and the western parts of the world," into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any national character under the general sovereignty of the country.' (1 Kent Com., 78, 79.) * * *

"If the conclusions heretofore arrived at are correct, the Austrian agents had no more right to take Koszta from the soil of the Turkish dominion than from the territory of the United States, and Captain Ingraham had the same right to demand and enforce his release as he would have had if Koszta had been taken from American soil and incarcerated in a national vessel of the Austrian Emperor. In this question, confined as it is to the United States and Austria, the place of the transaction is immaterial, unless the Austrian municipal laws extended over it. * * *

"The conclusions at which the President has arrived, after a full examination of the transaction at Smyrna, and respectful consideration of the views of the Austrian Government thereon, as presented in Mr. Hülsemann's note, are, that Koszta, when seized and imprisoned, was invested with the nationality of the United States, and they had, therefore, the right, if they chose to exercise it, to extend their protection to him; that from international law—the only law which can be rightfully appealed to for rules of action in this case—Austria could derive no authority to obstruct or interfere with the United States in the exercise of this right, in effecting the liberation of Koszta; and that Captain Ingraham's interposition for his release was, under the peculiar and extraordinary circumstances of the case, right and proper."

Mr. Marcy, Sec. of State, to Mr. Hülsemann, Sept. 26, 1853. MSS. Notes, Austria. See *supra*, § 175; 3 Lawrence com. sur droit int., 138; 4 *ibid.*, 179, 180.

Mr. Marcy's position, as above given, is sustained by Calvo, droit int. (3 ed) ii, 96; and questioned by Hall, Int. Law, § 72.

As to Koszta's case, see, for full correspondence, President's message, 1st sess. 33d Cong., House Ex. Doc. 1, 91; Senate Ex. Doc. 1, 33d Cong., 1st sess. The correspondence with the American legation in Constantinople and the consul at Smyrna in this case is given in Senate Ex. Doc., 40, 33d Cong., 1st sess.; Ex. Doc. 53, same session; Br. and For. St. Pap. 1853-'54, 925.

A person domiciled in the United States is entitled "to our care and consideration, and in most circumstances may be regarded as under our protection."

Mr. Marcy, Sec. of State, to Mr. Buchanan, March 17, 1854. MSS. Inst., Gr. Brit.

By the personal instructions of the Department of State issued by Mr. Bayard, Secretary of State, in 1885, in section 118 it is provided that "nothing herein contained is to be construed as in any way abridging the right of persons domiciled in the United States, but not naturalized therein, to maintain internationally their status of domicil, and to claim protection from this Government in the maintenance of such status."

As to abandonment of citizenship by change of domicil, see *supra*, §§ 176, 190.
As to passports based on domicil, see *supra*, § 193.
As to Thrasher's case, see *supra*, § 190; 6 Webster's Works, 518 *ff.*

"As to strangers, those who settle in an enemy's country after a war is begun, of which they had previous notice, may justly be looked on as enemies."

Burlamaqui's Polit. Law, 281, adopted by Mr. Pinkney as commissioner in the case of the Betsey. Wheaton's Life of Pinkney, 251; *infra*, § 352.

That domicile by neutral in belligerent's country may extinguish neutral rights, see *infra*, § 352.

(2) OBTAINING AND PROOF OF.

§ 199.

"While a resident domicil here would not be interrupted by transient absences, *animo revertendi*, yet the establishment, during absence from the United States, of a domicil in Switzerland * * * would be in conflict with and annul the American domicil for the purpose of the naturalization statutes. The question here occurs whether a residence *animo manendi* in Switzerland, or legal domicil there, is a condition to the acceptance of municipal office, like that held by Mr. Nordmann. It is to be borne in mind that when he took his seat in the council, he was still a Swiss citizen. Under these circumstances any evidence of intention to maintain Swiss domicil has especial weight."

Mr. Bayard, Sec. of State, to Mr. Cramer, May 6, 1885. MSS. Inst., Switz. See Whart. Confl. of Laws, §§ 20 *ff.*

For a discussion of American cases in which the place of abode of the wife and family were considered as criteria of domicile, see 4 Phill. Int. Law (2 ed.), 171.

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.

U. S. *v.* Gillies, Pet. C. C., 159.

In determining the question of domicil, the chief point to be considered is the *animus manendi*, which may be proved by declarations or inferred from the circumstances of the case. If it appear that the intention of removing was to make a permanent settlement, or for an in-

definite time, the right of domicil is acquired by a residence even of a few days. The effects of domicil cease from the moment the party puts himself in motion, *bona fide*, to quit the country, intending not to return.

The Venus, 8 Cranch, 253.

A naturalized citizen returned to his native country for the purpose of trade; after residing there and engaging in business for nine years, but with the intention of returning again to his adopted country, war broke out between the two countries. His business being complicated, he remained in his native country a little more than a year after his first knowledge of the war, for the purpose of winding up his affairs, but engaging in no new commercial transaction whatever with the enemy, and then returned to his adopted country. It was held that he had gained a domicil in his native country, and that his goods, being captured, were liable to condemnation.

The Frances, 8 Cranch, 335.

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.

If a native citizen of the United States emigrate, before a declaration of war, to a neutral country and acquire a domicile there, and afterwards return, during the war, to the United States and reacquire his domicil here, he becomes a redintegrated American citizen, and cannot *flagrante bello* separate himself from his character as such and acquire a neutral character by returning to his adopted country.

The Dos Hermanos, 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.

Kosciusko's "declarations that his residence was in France, in the way they were made in his wills, with an interval of ten years between them, would, upon the authority of adjudged cases, be sufficient to establish, *prima facie*, his domicil in France. They have been received in the courts of France, in the courts of England, and in those of our

own country. * * * Kosciusko's domicil of origin was Lithuania, in Poland. The presumption of law is that it was retained, unless the change is proved, and the burden of proving it is upon him who alleges the change. (Somerville *v.* Somerville, 5 Ves., 787.) * * * But what amount of proof is necessary to change a domicil of origin into a *prima facie* domicil of choice? It is residence elsewhere, or where a person lives out of the domicil of origin. That repels the presumption of its continuance, and casts upon him who denies the domicil of choice the burden of disproving it. Where a person lives is taken *prima facie* to be his domicil until other facts establish the contrary. * * * It is difficult to lay down any rule under which every instance of residence could be brought which may make a domicil of choice. But there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence. That intention may be inferred from the circumstances or condition in which a person may be as to the domicil of his origin, or from the seat of his fortune, his family, and pursuits of life. * * * A removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown, or inferred from circumstances, that it was for some particular purpose expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, it does change the domicil. The result is that the place of residence is *prima facie* the domicil, unless there be some motive for that residence not inconsistent with a clearly-established intention to retain a permanent residence in another place."

Ennis *v.* Smith, 14 How., 422, *ff.*

A party who puts himself *in itinere* to return to his native country, is already deemed to have assumed his native character.

The St. Lawrence, 1 Gall., 467; The Frances, *ibid.*, 614. See to this effect Whart. Confl. of Laws, § 55.

(3) EFFECT OF.

§ 200.

The adoption of a belligerent domicil by a neutral subjects him to belligerent liabilities.

Infra, § 352.

Domicil in the United States gives a claim of protection as to all rights the law of nations attaches to domicil.

Supra, §§ 193, 198.

Acceptance of a foreign domicil may work abandonment of prior citizenship.

Supra, § 176.

As to domicil in relation to marriage, see *infra*, §§ 260 *ff.*

As to general relations of domicil, see Whart. Confl. of Laws, §§ 20 *ff.*

Domicil, not nationality, must be the basis of appeal when a citizen of the United States seeks to claim the protection of the municipal law of his particular State or Territory. Citizenship in the United States would not by itself avail him for this purpose. He must prove his domicil in the particular State or Territory of whose laws he seeks the benefit.

Whart. Confl. of Laws, § 8.

XII. *ALIENS.*

(1) RIGHTS OF.

§ 201.

As to treaty stipulations, see *supra*, §§ 140 *ff.*

As to rights of foreigners in Mexico, see Consular Reports on Commercial Relations, 1883, No. 31, 688 *ff.*

"There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own, to the protection of its sovereign by all the efforts in his power."

Mr. Adams, Sec. of State, to Mr. De Onis, Mar. 12, 1818. MSS. Notes, For. Leg.

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

Mr. Adams, Sec. of State, to Mr. Anderson, May 27, 1823. MSS. Inst., Ministers.

"There are no provisions in existing treaties between the United States and Great Britain touching the general right of British subjects to hold real estate or personal property in the United States. The right of foreigners to hold title to real estate is entirely dependent on the laws of the State in which the land is situate. Foreigners may obtain title to public lands owned by the United States by purchase. They cannot, however, enter such lands under the pre-emption or homestead laws without having first declared their intention to become citizens of the United States."

Mr. Cadwalader, Asst. Sec. of State, to Mr. Lowe, Nov. 25, 1874. MSS. Dom. Let.

To the same effect see Mr. Bayard to Mr. Lehman, June 23, 1885, quoted *supra*, § 150.

As to effect of such treaties generally see *supra*, § 138.

"It is clear, by the common law, that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year-books, and has been uniformly recognized as sound law from that time. * * * Nor is there any distinction, whether the purchase be by grant or by devise. In either case, the estate vests in the alien, * * * not for his own benefit, but for the benefit of the state; or, in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seized into the hands of the sovereign. * * * But until the lands are so seized, the alien has complete dominion over the same. * * * He may convey the same to a purchaser. * * * In respect to these general rights and disabilities we do not find that there is any admitted difference between alien friends and alien enemies. During the war the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. * * * But as to capacity to purchase, no case has been cited in which it has been denied; and in the Attorney-General *v.* Wheeden and Shales, Park. Rep., 267, it was adjudged that a bequest to an alien enemy was good, and, after peace, might be enforced. Indeed, the common law, in these particulars, seems to coincide with the *jus gentium*."

Story, J.; Fairfax *v.* Hunter, 7 Cranch, 619 *ff.*

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

Chirac *v.* Chirac, 2 Wheat., 259; Carneal *v.* Banks, 10 Wheat., 181; *supra*, §§ 138, 148.

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

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

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

Soc. for Prop. of Gospel *v.* New Haven, 8 Wheat., 464. See, as to effect of the war of 1812 on prior treaties in this respect, Mr. Bayard, Sec. of State, to Mr. Lehman, June 23, 1885. MSS. Dom. Let.; cited *supra*, § 150.

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

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

The statute of 11 and 12 William III, chap. 6, enacting that the king's natural-born subjects within the realm should inherit and be inheritable, and make their pedigrees and titles by descent from any of their

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

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

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

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

Aliens at common law have no inheritable blood, and cannot take or transmit land by descent.

Levy *v.* McCartee, 6. Pet., 102.

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

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

The title acquired by an alien by purchase is not divested until office found. It cannot be divested but by some notorious act, by which it may appear that the freehold is in another.

Fairfax *v.* Hunter, 7 Cranch, 603. Followed, Craig *v.* Bradford, 3 Wheat., 594; Jones *v.* McMasters, 20 How., 8; and see Cross *v.* De Valle, 1 Wall., 1.

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

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

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

U. S. *v.* Diekelman, 92 U. S., 520.

The constitution of Texas, although declaring generally that aliens shall not hold land in Texas, except by title emanating directly from the Government, did not divest their title, for it adds that "they shall have a reasonable time to take possession of and dispose of the same, in a manner hereafter to be pointed out by law." Before the title can

be divested, proceedings for enforcing its forfeiture must be provided by law and carried into effect, and hitherto they have not been provided.

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

It has been also held that a sale of lands in Texas, made before her separation from Mexico, by a citizen to a non-resident alien, passed the title to the latter, who thereby acquired a defeasible estate in them, which he could hold until deprived thereof by the supreme authority, upon the official ascertainment of the fact of his non-residence and alienage, or upon the denouncement of a private citizen. "By the common law an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the Government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law as 'office found.' It removes the fact upon the existence of which the law divests the estate and transfers it to the Government, from the region of uncertainty and makes it a matter of record. It was devised, according to the old law writers, as an authentic means to give the King his right by solemn matter of record, without which he in general could neither take nor part with anything, for it was deemed 'a part of the liberties of England, and greatly for the safety of the subject, that the King may not enter upon or seize any man's possessions upon bare surmises, without the intervention of a jury.' By the civil law some proceeding equivalent in its substantive features was also essential to take the fact of alienage from being a mere matter of surmise and conjecture, and to make it a matter of record. Such a proceeding was usually had before the local magistrate or council, and might be taken at the instance of the Government, or upon the denouncement of a private citizen. The course pursued in the present case seems to have been in conformity with common usage. The fact of alienage and non-residence was thus officially established; it became matter of record, and the subsequent declaration of the commissioner that the land was vacant was the judgment which the law prescribed in such cases. The land was then subject to be regranted by the commissioner, as fully as though no previous grant to him had ever been made."

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

"The efficacy of the treaty (of 1850 with Switzerland) is declared and guaranteed by the Constitution of the United States. That instrument took effect on the fourth day of March, 1789. In 1796, but a few years later, this court said: 'If doubts could exist before the adoption of the present National Government, they must be entirely removed by the sixth article of the Constitution, which provides that "all treaties made or which shall be made under the authority of the United States" shall be the supreme law of the land, and the judges in every State shall be bound

thereby, anything in the constitution or laws of any State to the contrary notwithstanding.' There can be no limitation on the power of the people of the United States. By their authority the State constitutions were made, and by their authority the Constitution of the United States was established, and they had the power to change or abolish the State constitutions, or to make them yield to the General Government and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State legislature can stand in its way. If the constitution of a State (which is the fundamental law of the State and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power—an act of the State legislature—must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. (Ware *v.* Hylton, 3 Dall., 199.)

"It will be observed that the treaty-making clause is retroactive as well as prospective. The treaty in question, in Ware *v.* Hylton, was the British treaty of 1783, which terminated the war of the American Revolution. It was made while the Articles of Confederation subsisted. The Constitution, when adopted, applied alike to treaties 'made and to be made.'

"We have quoted from the opinion of Mr. Justice Chase in that case, not because we concur in everything said in the extract, but because it shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurist of the country.

"In Chirac *v.* Chirac (2 Wheat., 259), it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them precisely in the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in Carneal *v.* Banks (10 *ibid.*, 181), and with respect to the British treaty of 1794 in Hughes *v.* Edwards (9 *ibid.*, 489). A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. (Orr *v.* Hodgeson, 4 *ibid.*, 453.) By the British treaty of 1794 'all impediment of alienage was absolutely leveled with the ground, despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. (Fairfax's Devisees *v.* Hunter's Lessee, 7 Cranch, 627. See Ware *v.* Hylton, 3 Dall.,

242; 8 Op., Att'ys-Gen., 417.) Mr. Calhoun, after laying down certain exceptions and qualifications which do not effect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it.' (Treat. on the Const. and Gov. of the U. S., 204.)

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

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

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

Swayne, J.; Hauenstein *v.* Lynham, 100 U. S., 488. See *supra*, §§ 138, 163.

The State legislation in this relation may be thus analyzed:

Statutes in which there are no restrictions on the rights of aliens to acquire and hold land:

Alabama, Code, 1876, §§ 2860, 2861; Colorado, Stat., 1880; Florida, Stat., 1880; Illinois, Rev. Stat., 1880, chap. 6, § 1; Iowa, Code, 1873, § 1908; Kansas, Gen. Stat., 1860, 40; Maine, Rev. Stat., 1857, 449; Massachusetts, Rev. Stat., 1873, chap., 91; Michigan, Compiled Laws, 1871, 79; Howell's Annot. Stat., § 5775; Minnesota, Gen. Stat., 1873, § 22; Mississippi, Rev. Code, 1880, § 1230; Missouri, Rev. Stat., 1879, § 325; Ohio, Rev. Stat., 1880, § 4173; Nebraska, Rev. Stat., 1873, 53; New Hampshire, Rev. Stat., 1867, 253; New Jersey, Rev. of 1877, 6, 296; North Carolina, Code, 1883, § 7; South Carolina, Rev. Stat., 1873, 440-537; West Virginia, Acts of 1882, chap. lxx; Wisconsin, Rev. Stat., 1878, § 2200.

States which make the permanent holding of lands by aliens dependent upon residentship or upon a declaration of intended naturalization, but which give to aliens inheriting land a term varying from three to nine years to dispose of the title:

Arkansas, Code, 1874, § 2167; California, Code, 1876, 6, 404; Connecticut, Stat., 1866, 137; Delaware, Rev. Code, 1874, 493; Indiana, Rev. of 1876, chap. 11; Kentucky, Gen. Stat., 1873, 191; Maryland, Code, 1860, 18; New York, Fay's Dig., 1876, 552, 553; Tennessee, Stat., 1871, 953; Virginia, Code, 1873, 130.

Texas, rights conditioned either on (1) reciprocity, or (2) declaration of intended citizenship. (Rev. Stat., 1879, §§ 9, 1658.)

In Georgia, by the Code of 1873, § 2676, title is conditioned and improvements being made and limited to 160 acres.

In Pennsylvania alien absentee proprietorship is limited to 5,000 acres for each holder. (Bright. Purd., 67.)

As to Texas, see Sattegart *v.* Schrimpff, 35 Tex. 323.

As to New York, see Heeney *v.* Brooklyn, 33 Barb., 360; Goodrich *v.* Russell, 42 N. Y., 177; Ettenheimer *v.* Hellman, 66 Barb., 374, where it was held that aliens

cannot take land as successors in intestacy. Compare Lawrence com. snr droit int., 3, 89.

As to Kentucky, see Yeaker *v.* Yeaker, 4 Metc. 33; Eastlake *v.* Rodaquest, 11 Bush. 42.

As to Iowa, see Purczell *v.* Smidt, 21 Iowa, 540; Greenhold *v.* Stanforth, 21 Iowa, 595.

As to Michigan, see Crane *v.* Reader, 21 Mich., 24.

As to Nevada mining claims, see Golden Fleece *v.* Cable Co., 12 Nev. 312.

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

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

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

Ibid.

The statute of New York of May 31, 1881, imposing a tax on every alien passenger who shall come by vessel from a foreign country to the port of New York, and holding the vessel liable for the tax, is a regulation of foreign commerce, and void.

Henderson *v.* Mayor of New York, 92 U. S., 259; Chy Lung *v.* Freeman, *ibid.*, 275; cited and affirmed in People *v.* Compagnie Générale Transatlantique, 107 U. S., 59.

The statute is not relieved from this constitutional objection by declaring in its title that it is to raise money for the execution of the inspection laws of the State, which authorize passengers to be inspected in order to determine who are criminals, paupers, lunatics, orphans, or infirm persons, without means or capacity to support themselves, and subject to become a public charge, as such facts are not to be ascertained by inspection alone.

People *v.* Compagnie Générale Transatlantique. 107 U. S., 59.

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

Taylor *v.* Carpenter, 3 Story, 458. See, on this topic, Whart. Confl. of Laws, §§ 17 *ff.*

A court of equity will treat a devise by an alien as valid against heirs at law until the title of the alien has been impeached by proceedings on the part of the state. All the authorities agree that at common law an alien can take lands by purchase—that is, by grant or devise—though not by descent; although the estate vests in the alien not for his own benefit but for the benefit of the state. If the state sees fit

to seize the lands, the same rule must prevail in equity, for it is a general principle of equity that equitable estates are subject to the same modes and condition as corresponding legal estates.

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

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

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

Aliens cannot claim mining lands under the act of May 10, 1872.

North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. Rep., 522; 6 Sawyer, 299.

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

La Croix *v.* May, 15 Fed. Rep., 236. Whart. Confl. of Laws. §§ 17 *ff.*

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

1 Op., 110, Lincoln, 1802.

The courts of the United States are at all times open to the subjects of a foreign power in friendly relations with us. And more especially will such remedies be extended in case of fraud.

1 Op., 192, Rush, 1816.

An alien can inherit, carry away, and alienate personal property without being liable to any *jus detractus*. But real estate is subject to the laws of the respective States.

1 Op., 275, Wirt, 1819.

The right of pre-emption, under the acts of 1830 and 1834, accrues to persons who were not citizens of the United States at the time of their passage, especially where the local law authorizes them to hold and convey real estate.

3 Op., 91, Butler, 1836.

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

3 Op., 254, Butler, 1837. Whart. Confl. of Laws, §§ 17 *ff.*

An alien may hold, convey, and devise real estate in the District of Columbia.

5 Op., 621, Crittenden, 1852.

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

7 Op., 229, Cushing, 1855. Whart. Confl. of Laws, §§ 17 *ff.*

Aliens are entitled to purchase public lands, subject only as to their tenure to such limitations as particular States may enact, with the exception that pre-emptions are secured only to such as have declared their intention to become naturalized.

7 Op., 351, Cushing, 1855.

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

8 Op., 98, Cushing, 1856.

The prevailing rule in the various States is that aliens can inherit.

12 Op., 5, Stanbery, 1866.

The treaties bearing on alienage are noticed in part in prior sections.

Supra, §§ 142 *ff.*

(2) NOT COMPELLABLE TO MILITARY SERVICE.

§ 202.

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

"It is proper to state, however, that in every case when an alien has exercised suffrage in the United States he is regarded as having forfeited his allegiance to his native sovereign, and he is, in consequence of that act, like any citizen, liable to perform military service. It is understood, moreover, that foreign Governments acquiesce in this construction of the law. It is hoped that under this construction your militia force will not be sensibly reduced."

Mr. Seward, Sec. of State, to Mr. Morton, Sept. 5, 1862. MSS. Dom. Let.

As to obligation of aliens in such cases in foreign states, see *supra*, § 182.

As to local allegiance, see *infra*, § 203; and see Mr. Fish, Sec. of State, to Mr. Foster, Oct. 31, 1873. MSS. Inst., Mex.

As to treaties in this relation, see *supra*, §§ 141 *ff.*

"Your dispatch of June 29, No. 322, has been received. If the minister of Switzerland, residing at Paris, had been informed of all the facts bearing on the question which he has raised, I cannot believe that he would have thought it necessary to offer objections against the President's proclamation concerning the liability of emigrants in the United States to perform military service.

"The Federal Constitution authorizes Congress to adopt uniform rules of naturalization, and Congress, heretofore, prescribed the conditions of five years' residence, a preliminary declaration of intention to become a citizen, and a subsequent oath of renunciation of the native allegiance and acceptance of the new one.

"But, on another hand, the Federal Constitution recognizes a citizenship of each State, and declares that the citizens of one State shall enjoy the right of citizenship in every other State, and leaves it to each State to prescribe the conditions of its own proper citizenship. By the constitutions of several of the States, especially the new ones, the preliminary declaration of intention, above mentioned, entitles the maker of it to all the rights of citizenship in that State, and they freely enjoy and exercise those rights. They enjoy ample protection and exercise suffrage. It was with reference to this state of facts that Congress passed the law which is recited in the President's proclamation. And they passed another act, which authorized the Secretary of State to extend the protection of the Government to all persons who, by any laws of the United States, are bound to render military service. The two laws seem to this Government to be reasonable and just, and they constitute a new, additional, and uniform law of Federal naturalization. But it was foreseen that some emigrants, who had declared their intention, might complain of surprise if they were immediately subjected to conscription. To guard against this surprise the proclamation was issued, giving them ample notice of the change of the law, with the alternative of removal from the country if they should prefer removal to remaining here on the footing on which Congress had brought them. Surely no foreigner has a right to be naturalized and remain here, in a time of public danger, and enjoy the protection of a Government, without submitting to general requirements needful for his own security. The law is constitutional, and the persons subjected to it are no longer foreigners, but citizens of the United States. The law has been acquiesced in by other foreign powers, and I am sure that Switzerland cannot be disposed to stand alone in her protest against it."

Mr. Seward, Sec. of State, to Mr. Dayton, July 20, 1863. MSS. Inst., France; Dip. Corr., 1863.

"Your dispatch of the 13th ultimo, No. 133, in relation to the case of certain citizens of the United States, who were impressed into the military service of Mexico, and who are now said to be actually serving in the Thirty-first Battalion of the army of that Republic, has been received.

"The grounds assumed by you in the correspondence between yourself and Mr. Fernandez, in regard to the demand for the immediate release of these citizens, following, as they do, the views expressed by the Department in its instruction of the 9th of October, are in entire accord with the position which this Government assumes in relation to the un-

friendly and unwarranted course of the Mexican civil and military authorities towards these citizens of the United States, and your course is approved.

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

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

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

Mr. Evarts, Sec. of State, to Mr. Morgan, Dec. 8, 1880. MSS. Inst., Mex; For. Rel., 1881.

"With reference to the cases of American citizens impressed into the military service of Mexico, which were reported to the Department by Mr. Schuchardt, the United States vice-consul at Piedras Negras, and in regard to which you were instructed, and have had correspondence with Mr. Mariscal, I transmit a copy of a dispatch of the 18th ultimo from Mr. Schuchardt. His suggestion that the persons or their representatives so impressed, and who afterwards died or were killed or discharged, should have a pecuniary indemnity from that Government,

seems to be at least worthy of consideration. It is notorious that the impressment of American seamen into the naval service of a foreign power was at one time a serious grievance, not to be acquiesced in, and raised a question upon which all parties in this country were unanimous in regarding as one of international character. Public sentiment here in regard to that subject was borne in mind during the late civil war. The number of persons of foreign birth, especially in the large cities, led to the accidental or involuntary enrollment of unnaturalized aliens in the military or naval service. These, however, as is shown by the large space in the records of the Department at the time, were at once discharged upon complaint made and in the absence of proof of their naturalization. It is hoped, therefore, that in considering this subject the Mexican Government will not only have due regard to the unlawfulness of the impressment, but to the universal and strong sentiment upon the subject which pervades this country."

Mr. Blaine, Sec. of State, to Mr. Morgan, Mar. 14, 1881. MSS. Inst. Mex.; For. Rel., 1881.

As to election given to aliens in the United States to enlist or be expelled, see Mr. Seward, Sec. of State, to Mr. Dayton, July 20, 1863, quoted *infra*, § 206.

An alien can be enlisted in the naval or Marine Corps service of the United States, and is bound, the same as a citizen, to serve for the term of his enlistment.

4 Op., 350, Nelson, 1844. See 3 Op., 670, Legaré, 1831. *Infra*, § 392.

It was held by Mr. Cushing, in 1854, that officers of the Army employed in recruiting may enlist persons not naturalized as citizens of the United States, on the ground that the provision of the act of 1802, limiting enlistments to citizens, has not been re-enacted in any subsequent law.

6 Op., 474, Cushing, 1854. *Infra*, 392.

The requirements at present are as follows:

SEC. 1116. Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years at the time of their enlistment. This limitation as to age shall not apply to soldiers re-enlisting.

See *In re* McDonald, 1 Lowell, 100.

SEC. 1117. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control.

See Shorner's case, 1 Car. L. Rep., 55.

SEC. 1118. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of [*any criminal offense,*] [a felony] shall be enlisted or mustered into the military service.

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

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

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

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

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

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

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

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

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

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

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

(3) SUBJECT TO LOCAL ALLEGIANCE.

§ 203.

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

Mr. Jefferson, Sec. of State, to Mr. Genet, June 5, 1793. MSS. Notes, For. Leg.; 1 Wait's St. Pap., 80; 1 Am. St. Pap. (For. Rel.), 150. See to same general effect Carlisle *v.* U. S., 16 Wall., 147; and as to local allegiance, see generally *supra*, § 7.

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

Mr. Randolph, Sec. of State, to Mr. Hammond, April 13, 1795. MSS. Notes, For. Leg.

"The most inviolable and the most obvious right of an alien resident is that of withdrawing himself from a limited and temporary allegiance having no other foundation than his voluntary residence itself. The infraction of this right is consequently among the greatest of injuries that can be done to individuals, and among the justest of causes for the interposing protection of other Governments."

Mr. Madison, Sec. of State, to Mr. Pichon, May 20, 1803. MSS. Notes, For. Leg.

Sailors, when on shore, are subject to the police control of the sovereign of the shore, unless when otherwise provided by treaty.

Mr. Buchanan, Sec. of State, to Mr. Leal, Nov. 15, 1847. MSS. Notes, Brazil. Mr. Clayton to Mr. Macedo, Apr. 11, 1849; *ibid.*

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

Mr. Webster, Sec. of State, report to the President, Dec. 23, 1851. 6 Webster's Works, 524. This report (Thrasher's case) is not on record in the Department.

As to Thrasher's case, see, further, *supra*, §§ 190, 198; *infra*, §§ 229, 230, 244, 357.

"Mr. Jefferson, when Secretary of State, in his letter to Gouverneur Morris of the 16th of August, 1793, speaking of the right of private citizens to make war upon a country with which the Government of the United States is at peace, says: * * *

"'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. They would never prescribe an illegal act among the legal modes by which a citizen might disfranchise himself, nor render treason, for instance, innocent, by giving it the force of a dissolution of the obligation of the criminal to his country.'

"This is in accordance with the opinion of the circuit court of the United States for Pennsylvania, by whom it was stated, in 1793, that 'if one citizen of the United States may take part in the present war, ten thousand may. If they may take part on one side, they may take part on the other; and thus thousands of our fellow-citizens may associate themselves with the different belligerent powers, destroying not only those with whom we have no hostility, but destroying each other. In such a case, can we expect peace among their friends who stay behind? And will not a civil war, with all its lamentable train of evils, be the natural effect?'"

Report, above cited, of Mr. Webster, Sec. of State, to the President, in Thrasher's case, Dec. 23, 1851. 6 Webster's Works, 527. See *supra*, §§ 190, 198; *infra*, §§ 229, 230, 244, 357.

"It may be remarked, however, that in France and on the continent of Europe generally the police authorities have the right and are in the habit of setting on foot proceedings against individuals upon suspicion merely, and not upon probable cause alleged under oath.

The power referred to is, no doubt, sometimes abused. Citizens of the United States, however, whether native or naturalized, who, of their own accord, visit countries where it exists, must expect to incur that hazard, unless by treaty stipulations they should be placed upon a more favorable footing than the subjects of the Government whose agents may commit the abuse. We have no treaty with France which provides for such an exemption in favor of our citizens."

Mr. Marcy, Sec. of State, to Mr. Richter, Feb. 21, 1854. MSS. Dom. Let. See to same effect Mr. Buchanan, Sec. of State, to Mr. Osma, Feb. 1, 1848. MSS. Notes, Peru.

As to non-discrimination in such cases between subjects and aliens, see *infra*, §§ 230, 244; *supra*, §§ 189 *ff.*

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

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

"Koszta, it will be recollected, did not return to Austria or any of its dominions, but its officers attempted to seize him in a foreign country without any right to do so. Had Koszta been within the jurisdiction of Austria when he was seized, the whole character of the case would have been changed, and the forcible taking of him from the legal custody of Austrian officers could not have been defended on any principle of municipal or international law.

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

Mr. Marcy, Sec. of State, to Baron de Kalb, July 20, 1855. MSS. Dom. Let.
As to Koszta's case, see *supra*, § 198.

A *de facto* Government is entitled to local allegiance.

Mr. Cass, Sec. of State, to Mr. Clay, Nov. 26, 1858. MSS. Inst., Peru. See *supra*, § 7, as to title of *de facto* Government.

"Every independent state has the right to regulate its internal concerns in its own way, taking care to avoid giving just cause of offense to other nations. In almost all the European states there are police and administrative powers exercised by the Governments, which enable them to exert a very arbitrary authority over residents, whether

natives or foreigners. When our citizens enter those countries, they enter them subject to the operation of the laws, however arbitrary these may be, and responsible for any violation of them. Our treaty with Prussia recognizes this obligation and provides that the inhabitants of each of the said countries shall be at liberty to reside in the territories of the other party, and shall enjoy the same security and protection as natives, 'on condition of their submitting to the laws and ordinances there prevailing.'"

Mr. Cass, Sec. of State, to Mr. Wright, Dec. 10, 1858. MSS. Inst., Prussia.

A resident alien, who has not renounced his native allegiance, is not liable for military service; but it is otherwise if he has, by exercising suffrage under State law or otherwise, renounced such allegiance, even though he was not naturalized.

Mr. Seward, Sec. of State, to Mr. Morton, Sept. 5, 1862. MSS. Dom. Let. See *infra*, §§ 230, 244.

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

Mr. Seward, Sec. of State, to Lord Lyons, Apr. 20, 1864. MSS. Notes, Gr. Brit.; see *infra*, §§ 230, 244.

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

Mr. Seward, Sec. of State, to Mr. Culver, Dec. 2, 1864. MSS. Inst., Venez. See *infra*, §§ 230, 244.

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

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

Mr. Seward, Sec. of State, to Mr. Burton, Sept. 27, 1866. MSS. Inst., Colombia. See also Mr. Seward to Mr. Crosby, July 20, 1863. MSS. Inst., Cent. Am. Mr. Seward to Lord Lyons, May 30, 1862; Feb. 7, 1863; June 11, 1863. MSS. Notes, Gr. Brit.

The prohibition by the French Government, in 1873, of a course of lectures in France "on the advantages held out by a part of the United States to emigrants," while "one of those acts of illiberality which it is difficult to believe would have been exercised by a professedly republican government in this age of the world," cannot be alleged to have "transcended the limit of power to which an independent state, if inclined in the direction of the exercise of extreme powers of repression, may go without giving ground for remonstrance on the part of other states whose citizens may thereby be prohibited the exercise of free speech, or the opportunity of diffusing information tending to the possible melioration of the condition of large numbers of people."

Mr. Fish, Sec. of State, to Mr. Washburne, Mar. 1, 1873. MSS. Inst., France.

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

Mr. Fish, Sec. of State, to Mr. Williamson, June 13, 1876. MSS. Inst., Chili.

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

Mr. Blaine, Sec. of State, to Mr. Lowell, May 26, 1881. MSS. Inst., Gr. Brit.

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

Mr. Blaine, Sec. of State, to Mr. O'Connor, Nov. 25, 1881. MSS. Dom. Let. See also Mr. Blaine, Sec. of State, to Mr. Piatte, Dec. 6, 1881; *ibid.*; *supra*, § 7.

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

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

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

Mr. Bayard, Sec. of State, to Mr. Jackson, Aug. 5, 1885. MSS. Inst., Mex. See Mr. Bayard, Sec. of State, to Mr. Carasco, June 16, 1885. MSS. Dom. Let.

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

Carlisle *v.* U. S., 16 Wall., 147.

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

Young *v.* U. S., 97, U. S., 39. See *infra*, §§ 224, 228.

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

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

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

1 Op., 49, Bradford, 1794; 1 Op., 68, Lee, 1797.

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

1 Op., 49, Bradford, 1794; *infra*, §§ 230, 244.

The judicial power of a nation extends to every person and every thing in its territory, excepting only such foreigners as enjoy the right of extraterritoriality, and who, consequently, are not looked upon as temporary subjects of the state. If an exemption from this rule is claimed by a foreign ship of war, it is incumbent upon such ship to set forth and maintain clearly and satisfactorily its right to the exemption. Otherwise process may be served on board.

1 Op., 87, Lee, 1799; see, however, *supra*, § 36.

By the treaty between the United States and China, citizens of the former country are not subject to the laws of the latter.

7 Op., 495, Cushing, 1855.

As to undue discrimination against aliens, see *infra*, §§ 230, 230*a*.

As to privileges of extraterritoriality in Oriental countries, see *supra*, §§ 104, 125.

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

12 Op., 319, Stanbery, 1867.

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

Supra, § 21; Whart. Com. Am. Law, § 178. See Whart. Confl. of Laws, §§ 819, 820; Whart. Crim. Law (8th ed.), §§ 269, 281, chap. i.; Holtzendorff, 1215; Bonfils, De la competence des tribunaux français à l'egard des Estrangers, 1865; Ueber die Fehler des Franz. Civilrechts bezuglich der Fremden.

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

As to conflicts of criminal jurisprudence, see Whart. Com. Am. Law, §§ 350 *ff.*

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

Whart. Crim. Law (8th ed.), §§ 269 *ff.*, 281; Phill., 455; Van Wyck, De delictis extra regni territ. commiss., Utrecht, 1839.

As to commercial domicil, see Whart. Com. Am. Law, § 219. That residence establishes belligerent character, see Johnson *v.* Falconer, 2 Paine, 601; S. C., Van Ness, 1.

It has been held in England that where a foreigner in England is guilty of a breach of neutrality in conspiring against his native country, the English Government will undertake the prosecution, and will not leave it to the representatives of the foreign state. (See debate in the House of Lords, March, 1853.)

In 1799 certain English subjects were prosecuted for publishing a libel upon Paul I, Emperor of Russia. They were convicted and punished by fine and imprisonment.

State Trials (Howell), vol. xxvii, 627-630. Cited Fields' Int. Law, 87.

In 1803, Jean Peltier, a French refugee, was prosecuted for a libel on Napoleon Bonaparte, then first consul of the French Republic. He was convicted, but no judgment was entered in consequence of the breaking out of war.

State Trials (Howell), vol. xxviii, 530-619. See R. *v.* Most, cited in Whart. Com. Am. Law., § 138. Whart. Crim. Law, § 179.

"A nation has a right to harbor political refugees, and will do so, unless weakness of political sympathy lead it to a contrary course. But such persons may not, consistently with the obligation of friendship between states, be allowed to plot against the person of the sovereign, or against the institutions of their native country. Such acts are crimes, for the trial and punishment of which the laws of the land ought to provide, but do not require that the accused be remanded for trial to his native country."

Woolsey, § 79. See also Wildman's International Law, 59; Law Lib., vol. lii, 42.

"After the attempt to assassinate the Emperor of the French, on the 14th of January, 1858, the French minister of foreign affairs represented that plots to assassinate the Emperor had been formed in England, and asked that England should provide for the punishment of such offenses. In accordance with the request, Lord Palmerston, being prime minister, on the 8th of February introduced a bill for the punishment of conspiracies formed in England to commit murder beyond Her Majesty's dominions; but the bill was rejected, and the ministry immediately resigned. The bill was opposed by some from an unwillingness to interfere in any way with the right of asylum; but the controlling reason evidently was a feeling that the French Government had used too dictatorial a tone in demanding the passage of such a law."

Annual Register (1858), 5, 33, 202; Annuaire des deux Mondes (1857, 1858), 32, 110, 420, cited in Lawrence's Wheaton, 246, note. See *supra*, § 15; Whart. Crim. Law, 9th ed., §§ 220, 287, 1397, and discussion in 6 Crim. Law Mag., 155, (March, 1885).

"The same application was made to Sardinia, and a law was passed there making it a special offense to conspire against the lives of sovereigns, although the punishment originally proposed in the bill as introduced by the ministers was mitigated by the chambers. M. Cavour sustained the measure, both on political grounds and because he deemed it important that Sardinia, under the circumstances in which she was placed, should not act in opposition to the views of France."

Annuaire de deux Mondes (1857, 1858), 216.

(4) AND SO TO TAXATION.

§ 204.

"In the absence of treaties, citizens of the United States who have been and are remaining domiciled in foreign countries could (can) not be exempt from certain common obligations of citizens of those countries to pay taxes and perform duties imposed for the preservation of public order and the maintenance of the Government." But this may be modified by treaty.

Mr. Seward, Sec. of State, to Mr. Asboth, Mar. 27, 1867. MSS. Inst., Arg. Rep.

"It may be acknowledged that usually by public law and even by treaties, foreigners are not allowed greater immunities than citizens. Treaties, however, in some instances, for reasons best known to the parties, make an exception to the general rule. It has been seen that the 8th article of the treaty of 1831 may be justly construed as intending to create such an exception. Insurgent leaders in Mexico, and even the authorities of the Federal Government, may demand forced loans from Mexicans without any intention of paying either principal or interest, but when this demand is made from citizens of the United States compensation therefor may be expected, pursuant to the treaty. * * *

"When, however, money is wrested by threats or violence from a confiding foreigner by an insurgent chieftain, the victim cannot be expected to look for redress to the ordinary tribunals. It never could have been the intention of the treaty that in such a case he must seek reparation by such means. If so, justice and indemnity to the injured would so certainly be denied that the recourse to diplomatic intervention, which, according to public laws, would then be regular, might as well be adopted at once. No party would have any substantial interest put in jeopardy by such a step.

"It is true that Mr. Webster, in his note to Mr. Calderon on the subject, denied the accountability of this Government to the private individuals who suffered losses on the occasion of the riot at New Orleans. He does not, however, assign any reason for this opinion. It may be supposed, in their absence, that he was aware that there was no treaty between the United States and Spain containing articles similar to that between the United States and Mexico; and furthermore, that instead of being an organized rebellion, headed by persons of distinction, having for its object the overthrow of existing authority, that riot was a mere sudden ebullition of comparatively obscure individuals for the purpose of destroying property rather than that of extorting money for objects of rebellion.

"It may be conceded that by the public law foreigners in a country in a state of insurrection cannot be indemnified for all losses sustained from insurgents when the regular Government shall have been restored. The case of a forced loan, however, is believed to be an exception. The

meaning of the word loan is, that the money borrowed is to be returned. If the borrower is a sovereign, his obligation to repay the amount is as sacred as that of a private individual. If he is an insurgent, who for a time usurps the regular authority, the latter may justly be expected to make it good if the loan was an involuntary one."

Mr. Cadwalader, Acting Sec. of State, to Mr. Foster, Sept. 22, 1874. MSS. Inst., Mex. *Infra*, §§ 223 *ff.*

"As a general rule, the power to impose taxes (the question here being on an income tax levied in Germany on citizens of the United States there resident) is an attribute of sovereignty, and when the person or the property in question is a proper subject of taxation, the species of tax and the amount which should be collected may fairly be left to the state or Government exercising this power."

Mr. Fish, Sec. of State, to Mr. Davis, Nov. 21, 1874. MSS. Inst., Prussia.

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

Mr. Cadwalader, Asst. Sec. of State, to Mr. Melizet, Mar. 16, 1875. MSS. Dom. Let.

"This Government has not demanded for its citizens, domiciled and carrying on business in Cuba, exemption from the payment of their ordinary and just share of the general burdens of taxation, which, for proper subjects, and within proper limits, may be assessed against them, but the act of the authorities in the Island of Cuba, in forcibly seizing property of citizens of the United States—in compelling private citizens at their own expense to erect fortifications on their property, or in compelling the payment of a contribution assessed for a similar purpose by a military authority or by some self-constituted committee,—if correctly represented to this Government, partake of the character of military exactions, possible only in a state of war, and like them appear to have been enforced by military power, without recourse to the usual machinery by which taxation is imposed or collected. It cannot, I think, be doubted that such arbitrary acts of force, which compel private individuals to give up their property or to expend such money and labor for the Spanish Government, and to do that service which a Government, in general, performs at the public expense, can in no respects be called taxation and cannot be justified in time of peace, nor will it be doubted that if enforced they will give rise to a valid claim for compensation and indemnity."

Mr. Fish, Sec. of State, to Mr. Mantilla Jan. 11. 1876. MSS. Notes, Spain.

"Foreigners who have chosen to take up their residence, to purchase property, or to carry on business in a foreign country, thereby place

themselves under the jurisdiction of the laws of that country, and may fairly be called upon to bear their fair share of the general public burdens, when properly imposed upon them and other members of the community alike. As a general proposition, the right to tax includes the power to determine the amount which must be levied, and the objects for which that amount shall be expended. These powers are powers incident to sovereignty, the exercise of which, unless abused, cannot, in general be made the subject of diplomatic remonstrance."

Mr. Fish, Sec. of State, to Mr. Cushing, Jan. 12, 1876. MSS. Inst., Spain.

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

Mr. Fish, Sec. of State, to Mr. Adee, Dec. 21, 1876. MSS. Inst., Spain. See Mr. Evarts, Sec. of State, to Mr. Adee, Apr. 20, 1879; *ibid.*

"Your dispatch No. 1076, of the 24th of December last, has been received. It relates to a forced loan recently exacted from Messrs. Macmanus & Sons at Chihuahua, of which firm Mr. Scott, the consul, is a member. The exaction is believed to have been contrary to public law, and in this case, as the officer pursuant to whose orders it was carried into effect was in the service of the Mexican Government for the time being, it is expected that that Government will duly reimburse the victims.

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

"It appears that the consular office was made a place of deposit, not only for the available funds of Macmanus & Sons, but of other American citizens engaged in business in Chihuahua. When payment was first demanded of Mr. Scott he refused it, and closed the doors of his office against the officer who made the demand. The latter soon afterwards reappeared with an additional force, when Mr. Scott concluded that further resistance was useless, and opened his doors accordingly, when the officer obtained the sum required.

"Even supposing that the consul had been engaged in no other business than that of an official character, there is nothing in the treaty which guarantees to his place of business freedom from search. There is a distinct guarantee of the archives and papers of the consulate, but it is not alleged that these were disturbed.

"Pursuant to the thirty-first article of the treaty, the parties agreed to enter into a special convention for defining the powers and immunities of consular officers.

"Several attempts have been made for this purpose, but all have hitherto proved abortive. If any such convention should go into effect it might be expected, like others, to contain an article specially exempting the offices of consuls from being entered by the authorities of the country. At present no such exemption can be claimed by us as a matter of right in Mexico, especially in cases where a consular officer is a member of a mercantile firm and his place of business is the same as that of the firm."

Mr. Evarts, Sec. of State, to Mr. Foster, Feb. 20, 1880. MSS. Inst., Mex.; For. Rel., 1880. See *supra*, § 58.

As to Cuban taxes, see further Mr. Evarts, Sec. of State, to Mr. Fairchild, May 1, 1880. MSS. Inst., Spain.

This Government will regard the imposition in Cuba of taxes or charges discriminating against colored citizens of the United States on the ground of their color as the subject of international complaint.

Mr. Frelinghuysen, Sec. of State, to Mr. Hamlin, June 19, 1882. MSS. Inst., Spain. See also Mr. Frelinghuysen, Sec. of State, to Mr. Foster, Dec. 19, 1883. *Ibid.*

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

Mr. Porter, Acting Sec. of State, to Mr. Emmet, June 8, 1883. MSS. Inst., Turkey; For. Rel., 1885.

"Your No. 31, of the 17th ultimo, relative to a dispatch of our consular agent at Mytilene, transmitting to our consul at Smyrna the protest of foreigners in Mytilene against a decree of the governor of that island levying a tax on foreigners for the local public schools, is received.

"As Mr. Fottion's dispatch is not among your inclosures, it can only be inferred from Mr. Stevens's dispatch of the 5th ultimo, Mr. Heap's of the 14th ultimo (which you inclose), and your note to the imperial minister for foreign affairs, that there is no protest against this school

tax on the part of American residents in Mytilene, as Mr. Heap says he has no information that any Americans own real estate there, but that Mr. Fottion's appeal to the consul is a general one in the interests of foreign residents on account of two school taxes ordered, respectively, by the central and by the communal or municipal governments. If this is so it would go to prove that there was no discrimination shown against American residents, even supposing, as does not appear from the correspondence, that they would, not owning real estate there, be taxed at all, unless this is an income tax, which is not stated.

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

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

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

Mr. Bayard, Sec. of State, to Mr. Cox, Nov. 11, 1885. MSS. Inst., Turkey; For. Rel., 1885.

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

Mager *v.* Grima, 8 How., 490. See as to discrimination against aliens, *infra*, § 230.

(5) When local or personal sovereign liable for.

§ 205.

On the principle of territorial sovereignty, above stated (*supra*, §§ 1, 7), a local sovereign may be liable to foreign sovereigns for such damages done to them by aliens on his shores as he could have prevented.

Infra, §§ 223, 227.

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

Mr. Madison, Sec. of State, to Mr. C. Pinckney, Oct. 25, 1802; same to same, Feb. 6, 1804. MSS. Inst., Ministers. Mr. Madison to Mr. Monroe, Oct. 26, 1804. *Ibid.* See *infra*, § 398.

A sovereign who directs a subject to enter a foreign state and there inflict injuries is liable to such foreign state for the injuries. But there is no liabilty for offenses not so directed.

Supra, § 21; *infra*, §§ 228, 318.

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

Mr. Fish, Sec. of State, to Mr. Mariscal, Jan. 3, 1874. MSS. Notes, Mexico. See *supra*, § 21.

An invasion of a custom-house in Texas by citizens of Arkansas, and the violent abstraction therefrom of property, under a claim of title, constitute no ground of claim against the United States.

4 Op., 332, Nelson, 1844.

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

Ibid.

(6) MAY BE EXPELLED OR REJECTED BY LOCAL SOVEREIGN.

§ 206.

"This Government could never give up the right of excluding foreigners whose presence they might deem a source of danger to the United States."

Mr. Everett, Sec. of State, to Mr. Mann, Dec. 13, 1852. MSS. Dom. Let.

Nor will this Government consider such exclusion of American citizens from Russia necessarily a matter of diplomatic complaint to that country.

Ibid.

"Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations both in peace and war. A memorable example of the exercise of this power in time

of peace was the passage of the alien law of the United States in the year 1798."

Mr. Marcy, Sec. of State, to Mr. Fay, Mar. 22, 1856. MSS. Inst, Switz.

"It may always be questionable whether a resort to this power is warranted by the circumstances, or what department of the Government is empowered to exert it; but there can be no doubt that it is possessed by all nations, and that each may decide for itself when the occasion arises demanding its exercise."

Ibid.

"Even where a Government is not restricted by treaty engagements it is still a harsh measure to exclude the naturalized emigrant from his native country, or to subject him to penalties in the event of his return, even for a brief period, or when yielding to imperative circumstances. Business, anxiety to see near and valued relatives, a natural desire to visit the land of their birth—these and other motives, laudable in themselves, may well induce this class of our citizens to return to their native countries. It is difficult to perceive what rational objection can exist to the gratification of such feelings. Surely no danger can be apprehended to the public peace, for the Governments possess ample power for its preservation, even if there were a disposition, a very improbable supposition on the part of these few individuals, to disturb the tranquillity of the country. These remarks are not made in defense of the right of naturalized citizens of the United States, natives of Prussia, to revisit or reside in that country. That right is secured by treaty, but this Government relies upon the justice and friendship of that of Prussia not to permit any unfavorable impression respecting these returned naturalized citizens to work them injury."

Mr. Cass, Sec. of State, to Mr. Wright, Dec. 10, 1858. MSS. Inst., Prussia.

"The Federal Constitution authorized Congress to prescribe uniform rules of naturalization and Congress heretofore prescribed the conditions of five years' residence, a preliminary declaration of intention to become a citizen, and a subsequent oath of renunciation of the native allegiance and acceptance of the new one.

"But on another hand the Federal Constitution recognizes a citizenship of each State, and declares that the citizens of one State shall enjoy the right of citizenship in every other State, and leaves it to each State to prescribe the conditions of its own proper citizenship. By the constitutions of several of the States, especially the new ones, the preliminary declaration of intention above-mentioned entitles the maker of it to all the rights of citizenship in that State, and they freely enjoy and exercise those rights. They enjoy ample protection and exercise suffrage. It was with reference to this state of facts that Congress passed the law which is recited in the President's proclamation; and they passed another act which authorizes the Secretary of State to ex-

tend the protection of the Government to all persons who by any laws of the United States are bound to render military service. The two laws seem to this Government to be reasonable and just, and they constitute a new, additional, and uniform law of Federal naturalization. But it was foreseen that some immigrants who had declared their intentions might complain of surprise if they were immediately subjected to conscription. To guard against this surprise the proclamation was issued, giving them ample notice of the change of the law, with the alternative of removal from the country, if they should prefer removal to remaining here on the footing on which Congress had brought them. Surely no foreigner has a right to be naturalized and remain here in a time of public danger and enjoy the protection of a Government without submitting to general requirements needful for his own security. The law is constitutional, and the persons subjected to it are no longer foreigners but citizens of the United States. The law has been acquiesced in by all foreign powers, and I am sure that Switzerland cannot be disposed to stand alone in her protest against it."

Mr. Seward, Sec. of State, to Mr. Dayton, July 20, 1863. MSS. Inst., France. As to compulsory military service by aliens, see *supra*, § 202.

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

Mr. Seward, Sec. of State, to Mr. Clay, Aug. 24, 1866. MSS. Inst., Russia. On the same topic see Mr. Seward to Mr. C. M. Clay, Jan. 7, 1869. MSS. Inst., Russia. See *supra*, §§ 159, 172*a*.

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

"Strangers visiting or sojourning in a foreign country voluntarily submit themselves to its laws and customs, and the municipal laws of France, authorizing the expulsion of strangers, is not of such recent date, nor has the exercise of the power, by the Government of France,

been so infrequent, that sojourners within her territory can claim surprise when the power is put in force."

Mr. Fish, Sec. of State, to Mr. Washburne, Sept. 17, 1869. MSS. Inst., France.

The Government of the United States "is not willing and will not consent to receive the pauper class of any community who may be sent or may be assisted in their immigration at the expense of Government or of municipal authorities."

Mr. Fish, Sec. of State, to Mr. Moulding, Dec. 26, 1872. MSS. Dom. Let.

The power of expelling obnoxious foreigners is one incident to sovereignty.

Mr. Fish, Sec. of State, to Mr. Foster, Oct. 17, 1873. MSS. Inst., Mex.

"The admission that as that [the Mexican] constitution now stands and is interpreted, foreigners who render themselves harmful or objectionable to the General Government must expect to be liable to the exercise of the power adverted to, even in time of peace, remains, and no good reason is seen for departing from that conclusion now.

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

Mr. Evarts, Sec. of State, to Mr. Foster, July 10, 1879. MSS. Inst., Mex.

The increase of Mormon emigration to the United States from Austria is an evil to which the attention of the Austrian Government may properly be turned, asking such measures of repressing such emigration as may be practicable.

Mr. Evarts, Sec. of State, to Mr. Kasson, Aug. 9, 1879. MSS. Inst., Austria.

The Austrian Government subsequently took steps to check such emigration.

Mr. Frelinghuysen, Sec. of State, to Mr. Taft, July 28, 1884. Mr. Frelinghuysen, Sec. of State, to Mr. Francis, Aug. 7, 1884. MSS. Inst., Austria. As to passports to Mormons, see *supra*, §§ 191 *ff.*

"In the discussion of the points presented by the expulsion of certain American citizens from the Russian capital, on no charge or suspicion of misdoing, but on the naked allegation of being Hebrews, I remark that the Russian Government approaches the issue within the narrowest and most rigid limits of interpretation of which the treaty stipulations between the two countries are susceptible, and with no apparent disposition to concede as a rule to American citizens in Russia the same

treatment, irrespective of their belief, to which some other nationalities are entitled."

Mr. Blaine, Sec. of State, to Mr. Bartholomei, June 20, 1881. MSS. Notes, Russia.

"While, under the Constitution and the laws, this country is open to the honest and industrious immigrant, it has no room outside of its prisons or almshouses for depraved and incorrigible criminals or hopelessly dependent paupers, who may have become a pest or a burden, or both, to their own country; and the sending of such persons to our shores by the public authorities of Switzerland, either local or supreme, cannot be looked upon otherwise by this Government than as a violation of our national hospitality and a disregard of the spirit of comity and good neighborhood, which it is so desirable to foster and cherish between two nations bound so closely by the ties of long and unbroken friendship and kindred institutions, as are the United States and the Swiss Republic."

Mr. Blaine, Sec. of State, to Mr. Cramer, Dec. 3, 1881. MSS. Inst., Switz.

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

Mr. Frelinghuysen, Sec. of State, to Mr. Stillman, Aug. 3, 1882. MSS. Dom. Let.

"Although by virtue of section 4 of the act of August 7, 1882, the Secretary of the Treasury may call upon State boards of charities to execute the provisions of that section, there is no power possessed by him to constrain these boards to act, or to return convicts to 'the nation to which they belong,' except in the vessel in which they have come, and from a port in their own state."

Mr. Frelinghuysen, Sec. of State, to Mr. Nogueiras, Mar. 20, 1883. MSS. Notes, Portugal.

"The policy of assisted emigration is likely to send to us many who, lacking the qualities to secure a passage to America for themselves, and depending upon Government aid for this, presumably do not possess the qualities to successfully cope with the adverse circumstances which must necessarily attend their first efforts in a strange country, and it is in this natural tendency of such a policy that we find a legitimate reason for objection to its enforcement by Great Britain. Honest, industrious, and frugal immigrants will always be gladly received here, but this Government cannot look without deep concern upon any action by a foreign Government which tends to unloading its paupers, its 'ne'er-do-wells,' its aged and infirm, its cripples and weak-minded upon us, that we may afford that support through taxation which their native country owes them.

"It is quite evident how the assisted emigration of such thriftless and dependent classes may at once relieve the burdens of the home commu-

nity and entail corresponding burdens on a foreign community to an extent to justify international remonstrance. It is equally clear that the expedient of assisting emigration by Government aid is one only to be resorted to under circumstances which shall produce the greatest good to all alike, analogous, for instance, to an enlightened scheme of colonization. The object in view should rationally be not mere deportation of unproductive elements, but to offer to those whose home productiveness is impeded the advantages of a fresh start in life under more auspicious surroundings, such as the Great West supplies, whether in Canada or the United States. To such emigration as comes to its shores, willing, and within proper limits, able to join in the general work of production and self-sustenance, neither a fruitful dependency of the home state nor a friendly foreign state can rightly object."

Mr. J. Davis, Asst. Sec. of State, to Mr. Lowell, May 25, 1883. MSS. Inst. Gr. Brit.; For. Rel., 1883.

"Question has arisen touching the deportation to the United States from the British Islands, by governmental or municipal aid, of persons unable there to gain a living and equally a burden on the community here. Such of these persons as fall under the pauper class as defined by law have been sent back in accordance with the provisions of our statutes. Her Majesty's Government has insisted that precautions have been taken before shipment to prevent these objectionable visitors from coming hither without guarantee of support by their relatives in this country. The action of the British authorities in applying measures for relief has, however, in so many cases proved ineffectual, and especially so in certain recent instances of needy emigrants reaching our territory through Canada, that a revision of our legislation upon this subject may be deemed advisable."

President Arthur, Third Annual Message, 1883. See also President Arthur, First Annual Message, 1881.

"In the first place, the term 'convicts' covers all persons convicted, by due process of law, of any offense whatever not being a political offense. This would include many offenses not specified in any extradition treaty of the United States, and might give rise to inquiries on the part of any Government, whether having a treaty with us or not, or even positive demands for surrender with submission of legal proof of conviction, which, as the law stands, it might be difficult to decline compliance with. The idea of surrender of convicts, it seems to me, should be excluded, leaving it the clear intent of the law to enable the deportation of obnoxious criminals as a measure of social self-defense.

"In the second place, the provision that the convicts 'shall be sent back to the nations to which they belong and from whence they came,' might involve the questions: To what nation does a convict belong; to that which claims him as a citizen or that which claims him as a convict under its laws? And from what nation does he come; from that of

allegiance, or of conviction, or of last departure? A decision in any given case might involve a practically judicial act to be performed by persons or charitable bodies, in whom the law cannot have intended to vest judicial powers.

"The statute is mandatory that the convicts it names *shall* be sent back. It would seem desirable, that in the regulations which you are directed to prescribe for such sending back, the interpretation in these regards shall be clear, and I might add that it is especially desirable that neither officers of this Government nor State boards nor private associations or individuals be held responsible for the safe conveyance of any foreign convict from the United States to the territory of the country where the crime was committed."

Mr. Frelinghuysen, Sec. of State, to Mr. Folger, Nov. 15, 1882. MSS. Dom. Let.

"I have to acknowledge the receipt of your No. 183, apprising me of the resolution of the Swiss cantonal authorities of Zug, to grant a release to the prisoner J. Binzegger, a confirmed incendiary, on condition of his emigrating to this country, and to commend your zeal and promptitude in protesting to the Swiss Government in the premises.

"It is hoped and presumed that the action of the High Federal Government will prevent the consummation of the design to land this criminal on our shores, as a violation of the comity which should obtain between the two Governments; but should it in any way transpire that Binzegger embarks *en route* to this country, you will please at once telegraph the facts. Meantime I shall ask the Secretary of the Treasury to take the necessary steps for the return of Binzegger, if he lands here. It is, of course, desirable to be advised of the name of the vessel by which he leaves Europe and the date of sailing."

Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, Dec. 11, 1884. MSS. Inst., Switz.; For. Rel., 1885.

"In my dispatch No. 183, of the 26th ultimo, I had the honor to inform you that in a note to the Swiss Federal Council of the same date (a copy of which was inclosed in said dispatch), I protested against the discharge from prison, ordered by the grand council of the canton of Zug, of one Joseph Binzegger, who had been sentenced to imprisonment for life on account of incendiarism, upon the condition of his emigrating to the United States.

"On the 16th instant a note was received from the Federal Council, dated the 15th instant, in which is stated that, in general, the federal authorities had done all in their power to prevent the emigration of improper persons; that in the particular case of Joseph Binzegger he had been pardoned without any restrictive condition, and that instead of his going to the United States he intends to emigrate to Buenos Ayres.

"A copy of this note, with a translation thereof, is herewith inclosed."

Mr. Cramer to Mr. Frelinghuysen, Jan. 22. 1885, in reply; *ibid.*

On the same topic, see Mr. Frelinghuysen to Mr. Kasson, Jan, 15, 1885, quoted *supra*, § 184.

"Your No. 204, of the 20th ultimo, relative to the expulsion of Mr. H. T. C. Emeis, a naturalized citizen of the United States, from the territory of the canton of Neuchâtel, has been received.

"The statements which you communicate to regard to the passport. certificate of naturalization, and description of Henry Theodore Christian Emeis are verified by the records.

"The letter of Mr. Emeis addressed to you on the 7th ultimo, seems to be an honest and true statement. It appears therefrom that Mr. Emeis had been a considerable period making trial of different altitudes in Switzerland for his health; that his movements from place to place, though perfectly comprehensible from a proper point of view, were either willfully or otherwise misinterpreted; that his comparative ignorance of the French language, and of the adulterated German of the locality, complicated the case, and that the concluding act of the local authorities was to expel him from the canton.

"You say you have requested the High Federal Council to cause the authorities of Neuchâtel to revoke the order of expulsion as an act of simple justice, due alike to Mr. Emeis and to the country of which he is a citizen, and trust your course will be approved.

"It appears to this Department that such an act as you solicit at the hands of the Swiss Government is the least thing which could be asked for in the way of reparation, and to its extent it can be but acceptable. Your course, therefore, is approved."

Mr. Bayard, Sec. of State, to Mr. Cramer, Mar. 9, 1885. MSS. Inst., Switz.; For. Rel., 1885.

"I herewith inclose a copy of the affidavit of Mr. Charles L. George, a naturalized citizen of the United States, together with his citizen paper and that of his father, Mr. Peter George, in support of his complaint against the German Government for false imprisonment, the facts of which appear to be as follows:

"Peter George, the father, a native of Germany, came to this country in 1840, was naturalized, as shown by his citizen paper, on the 16th October, 1848, returned to Germany in 1851, and married there. The son Charles was born at Lamperts-loch, Alsace-Lorraine, on the 9th January, 1859, that is, after his father had been residing there eight years. Both father and son then appear to have continued to reside there until the son was over sixteen years of age, and then, in May, 1875, they came together to the United States, and have since resided more or less continuously at Philadelphia. The son states that he voted when he came of age, that is, in 1881, by virtue of his father's citizenship, but he appears, in anticipation of his return to Germany, to have taken out his own citizen paper on the 10th May, 1884. Furnished with this document the son, Charles, returned on a visit to his birthplace, arriving there on June 2, 1884. On the 12th July of the same year he was arrested by a gendarme named Rick, at the town of Sulz, on the Wald,

and taken to Strasburg, 30 miles distant by railroad, where he was imprisoned. The prison inspector told him his papers had been sent for, had arrived the third day after his arrest, and had been sent to the statthalter-general, Manteuffel. When he had been imprisoned twenty days his friends petitioned for his release, but were told that he must remain in prison for forty days, which he did, and was then released. When arrested he had 63 marks, which were taken from him, and on his release 40 marks and 71 pfennigs of them were retained, as the authorities told him, to pay his board while in prison and his railroad transportation, though he appears to have been put to hard enough work from 5 a. m. till 7 p. m., to pay for the poor food which he alleges that he received in prison.

"This case would seem to present some new points of difference with other cases in Alsace-Lorraine and also to be at variance with the course of procedure which this Department understands was to be adopted by the German authorities in their treatment of naturalized citizens of other countries whom they find in that province.

"Taking it for granted that the German Government still adheres to its previous refusal to apply the Bancroft treaty to Alsace-Lorraine, and referring to the edict of the statthalter of the 23d August, 1884, inclosed in Mr. Everett's No. 327, of the 4th September, 1884, it would appear that the utmost penalty for foreign citizens was expulsion from the province in case they declined to resume German nationality, and, if the third article of that edict is correctly understood here, *unmarried* foreigners would be allowed to remain in Alsace-Lorraine during good behavior, and should they marry, even their children might be allowed to remain until they reached the military age. There is no suggestion of fine or imprisonment in any case as a penalty for avoidance of military obligation by emigration. Even in the case of Constant Golly, as given in Mr. Kasson's No. 261, who was formally charged by the imperial foreign office, in their note of the 12th May, 1885, with intention to evade military duty, there was no fine or imprisonment, and he was simply told to leave by a certain date.

"In the present case of Charles George, an imprisonment of forty days, in spite of a petition to the statthalter, was rigorously insisted upon, and a part of the money found on him was retained to pay for his transportation to prison and his board while there, which, as far as this Department is aware, is the first time an American prisoner in Germany has been called upon to refund such expenses.

"In Mr. George's case it is not evident on what ground the Alsace-Lorraine authorities could base a charge of want of good faith on his part. He was not sixteen when he left Germany for America, and the period of being summoned for military service was too far distant, therefore, to look to as a reason. The fact that his father accompanied him and remained here with him ought to tell in his favor, and he does not appear to have been charged with wanting to remain in Alsace-Lor-

raine, which is, after all, the grievance complained of in the statthalter's edict, and against which all the precautions and punishments seem to be directed.

"The danger predicted by the statthalter is that 'in time the population of the country will be in a great measure composed of foreigners and the German army will lose a considerable number of recruits.' Judging him from this point of view, Mr. George neither deserved imprisonment nor expulsion. The arguments of the minister of foreign affairs, as given in Mr. Kasson's No. 265, would seem to have no application here, as they regard the two-years' clause of the Bancroft treaty, which does not, according to German interpretation, cover Alsace-Lorraine.

"You will take an early opportunity to bring the case of Mr. George to the attention of the foreign office, with a request for a careful examination into it, and such explanations as may best promote a continuance of the friendly relations between the Governments of Germany and the United States."

Mr. Bayard, Sec. of State, to Mr. Pendleton, July 7, 1885. MSS. Inst., Germ.; For. Rel., 1885.

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

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

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

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

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

Mr. Bayard, Sec. of State, to Mr. Pendleton, July 9, 1885. MSS. Inst., Germ.; For. Rel., 1885.

On the subject of expulsion, see further Mr. Frelinghuysen to Mr. Kasson, Jan. 15, 1885, quoted *supra*, § 185; same to same, Feb. 7, 1885, quoted *supra*, § 184.

As to expulsion of Jews from Russia or other countries, see *supra*, § 55.

"By the act of Congress of March 3, 1875, and August 3, 1882, it is made unlawful for certain persons to immigrate to the United States. Provision is made for the inspection of a vessel, if there is reason to believe that such persons are on board, and for their return at the expense of the vessel. (As to this act see Brit. and For. St. Pap., vol. 64, 1877–'78.)

"Diplomatic officers are enjoined to exert an active vigilance to prevent the deportation of these persons, and should they depart for the United States notice thereof should immediately be given that they may be stopped before landing.

"The shipping of known paupers or criminals to the United States is regarded as a violation of the comity which ought to characterize the intercourse of nations, and should be prevented by every proper measure.

"The accessions to the polygamous Mormon community are largely drawn from the ignorant classes of Europe. A recent decision of the Supreme Court of the United States has determined that the polygamy of Mormonism is a violation of the laws of the United States respecting the crime of bigamy, the provisions of which are embraced in section 5352 of the Revised Statutes. A recent statute defines the offense of polygamy and provides for prosecution and punishment. It is believed that no friendly power will knowingly lend its aid to attempts made within its borders against the laws and Government of the United States.

"Accordingly, the diplomatic representatives of the United States in Great Britain, Denmark, Sweden and Norway, Switzerland, Germany, Austria-Hungary, Italy, Belgium, the Netherlands, and France, have heretofore been instructed to urge the subject upon the attention of the Governments to which they are accredited, in the interest not merely of a faithful execution of the laws of the United States, but of the good order and morality which are sought to be promoted by all civilized countries."

Printed Pers. Inst. Dip. Agents, 1885.

The act of February 26, 1885 (48th Cong., 2d sess., chap. 161–164), provides as follows:

"SECTION 1. That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

"SEC. 2. That all contracts or agreements, express or implied, parol or special, which may hereafter be made by and between any person, company, partnership, or corporation, and any foreigner or foreigners, alien or aliens, to perform labor or service or having reference to the performance of labor or service by any person in the United States, its Territories, or the District of Columbia previous to the migration or importation of the person or persons whose labor or service is contracted for into the United States, shall be utterly void and of no effect.

"SEC. 3. That for every violation of any of the provisions of section one of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging or soliciting the migration or importation of any alien or aliens, foreigner or foreigners, into the United States, its Territories, or the District of Columbia, to perform labor or service of any kind under contract or agreement, express or implied, parol or special, with such alien or aliens, foreigner or foreigners, previous to becoming residents or citizens of the United States, shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States or by any person who shall first bring his action therefor including any such alien or foreigner who may be a party to any such contract or agreement, as debts of like amount are now recovered in the circuit courts of the United States; the proceeds to be paid into the Treasury of the United States; and separate suits may be brought for each alien or foreigner being a party to such contract or agreement aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit at the expense of the United States.

"SEC. 4. That the master of any vessel who shall knowingly bring within the United States on any such vessel, and land, or permit to be landed, from any foreign port or place, any alien laborer, mechanic, or artisan who, previous to embarkation on such vessel, had entered into contract or agreement, parol or special, express or implied, to perform labor or service in the United States, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such alien laborer, mechanic or artisan so brought as aforesaid, and may also be imprisoned for a term not exceeding six months.

"SEC. 5. That nothing in this act shall be so construed as to prevent any citizen or subject of any foreign country temporarily residing in the United States, either in private or official capacity, from engaging, under contract or otherwise, persons not residents or citizens of the United States to act as private secretaries, servants, or domestics for such foreigner temporarily residing in the United States as aforesaid; nor shall this act be so construed as to prevent any person or persons, partnership, or corporation from engaging, under contract or agreement, skilled workman in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: *Provided*, That skilled labor for that purpose cannot be otherwise obtained; nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants: *Provided*, That nothing in this act shall be construed as prohibiting any individual from assisting any member of his family or any relative or personal friend, to migrate from any foreign country to the United States, for the purpose of settlement here.

"SEC. 6. That all laws or parts of laws conflicting herewith be, and ıe same are hereby, repealed."

"It is not only the right but may sometimes be the duty of states to stablish checks upon the transit and sojourn of foreigners, however arsh those regulations may appear, or opposed to old established olicy. Indeed, in two countries where more freedom of entry or exit nd fewer restrictions are to be met with than elsewhere, within the ıst few years such regulations have been published. Thus, during the evolutionary period of 1848, an act of Parliament (11 and 12 Vict., c. 0) was passed in Great Britain * * * by which power was given) the executive in England and Ireland to remove aliens from the ealm; and in the United States it was declared, by an order, dated 19th ugust, 1861, that no person, if a foreigner, should be allowed to land ı the United States, without a passport from his own Government, ountersigned by a minister or consul of the United States."

Abdy's Kent, 110. This order, which grew out of the exigencies of the civil war, is no longer in force. See London Times, January 2, 1865.

The following documents may be referred to in this relation:

Mr. Russell's report of July 2, 1838 (House Rep. 1040, 25th Cong., 2d sess.), on foreign paupers.

President Van Buren's messages of May 15, May 25, 1838, with accompanying papers (House Ex. Doc. 370, 25th Cong., 2d sess.).

Senate Doc. 5, 34th Cong., 2d sess.

Report of Mr. Fuller, Aug. 16, 1856 (House Rep. 359, 34th Cong., 1st sess.)

House Ex. Doc. 253, 43d Cong., 1st sess.

A statute of the State of California provided that the commissioner f immigration should satisfy himself whether any passenger from a oreign port, not a citizen of the United States, belongs to certain enu- ıerated classes, among which were lunatics, idiots, and lewd or de- auched women, and that no such person should be permitted to land ntil a bond be given against any expense to be incurred for relief or ıpport. The master, owner, or consignee was allowed to commute by aying such sums as the commissioner might think proper to exact. It as decided that the object of this statute being to extort money from large class of passengers, or to prevent their immigration, thus in- ading the functions of Congress in regulating commerce, it is in con- ict with the Constitution, and therefore void.

Chy Lung *v.* Freeman, 92 U. S., 275.

XIII. *CORPORATIONS.*

FOREIGN CORPORATIONS PRESUMED TO BE ALIENS.

§ 207.

The members of a foreign corporation are conclusively presumed to e aliens, for the purpose of sustaining the jurisdiction of the circuit ourt over a suit brought by or against such a corporation.

National Steamship Co. *v.* Dyer, 1 Sup. C't Rep'r, 58; Ferry *v.* Imperial Fire Ins. Co., 9 West. Jur., 551.

As to corporations as claimants, see *infra*, § 217.

CHAPTER VIII.

NORTH AMERICAN INDIANS.

I. *JURISDICTION AND TITLE.*

(1) ARE DOMESTIC DEPENDENT NATIONS.

§ 208.

"The policy of the United States has been to allot to the Indian tribes, who were the original occupants of our soil, separate territories in which they are to enjoy a modified sovereignty. To subject them, while retaining their tribal organizations, to such laws as are passed for our Territories, would be cruel and absurd. When thus grouped in tribes they are incapable of working courts of record similar to those we find necessary to the maintenance of justice among ourselves; property as something susceptible of hypothecation and open to execution for debt they know nothing of; the marriage relation, as we hold it, as monogamous and indissoluble, and vesting the parties with specific rights in each other's property, is an institution which in their present state of civilization, could not be forced on them. Besides this, their subjugation and absorption as a mass has never been attempted; their tribes continue independent; those belonging to such tribes are not, in the proper sense, citizens of the United States. Hence it is that treaties innumerable have been negotiated with them as with independent sovereignties, and though when mingling in the population of a State they are subject to State law, they are regarded, when living on their own reservations, as subject, under certain limitations, to their distinctive jurisprudence, civil and criminal. They are, in Chief-Justice Marshall's language, 'domestic dependent nations.' When retaining their tribal relations they are not citizens of the United States, nor are they citizens of any particular State, unless made so by its distinctive laws. Certain Federal legislation, however, they are subjected to, even when grouped in tribes. Thus in 1868 Congress extended its laws imposing taxes on distilled spirits, fermented liquors, tobacco, and cigars

to the territory occupied by the Indians; and the Supreme Court held that this legislation was a constitutional exercise of the power vested in Congress, and gave effect to the statute, notwithstanding it came in conflict with the tenth article of the treaty of 1866, between the United States and the Cherokee Indians. And section 2145 of the Revised Statutes applies to the Indian country the laws of the United States as to crimes committed in any place 'within the sole and exclusive jurisdiction of the United States,' with the limitation made in the next section that this jurisdiction shall not be construed to extend to 'crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing an offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.' Yet, notwithstanding this subordination in these specified relations, Indians belonging to tribal organizations, so far from being citizens of the States in which they may be resident, are members of alien nationalities. If the doctrine of the ubiquity of national status be accepted, they carry the privileges as well as the disabilities of their status wherever they go. To accept that doctrine in this case would sustain not merely on Indian reserves, where by treaty Indian domestic law is supreme, but throughout the land, the civil irresponsibilities of Indians. They are irresponsible by their own laws; they would continue irresponsible when they leave their reserves, wherever they might wander. The answer to this is, that artificial limitations of capacity are not extraterritorial, and that no State will recognize foreign incapacities inconsistent with its particular policy."

Whart. Confl. of Laws, § 9.

"Adoption in a North American Indian tribe, according to our legislation, involves a change of political allegiance and of personal law as well as of family relations. The person adopted loses full citizenship in the United States, and in the particular State in which he previously resided, and becomes nationalized in the tribe of his adoption. He is no longer taxable by either Federal or State authorities, nor is he liable to suit, in either Federal or State court, by other members of his tribe. He may be indicted, it is true, in State or Territorial courts for crimes committed by him on persons not of his tribe; but for offenses against members of his tribe he is only justiciable before the tribal authorities. So far as concerns his domestic relations, he is governed, not by Territorial, but by tribal law. When living within the tribal reservation he is not indictable for polygamy, should he have two wives; though it would be otherwise should he leave the reservation and undertake to carry his two wives with him into non-tribal life. In case of his contracting in the tribe a marriage not monogamous, this marriage, though valid in the tribe, would be considered invalid by State or Federal courts. He inherits, after adoption, in accordance with tribal law; but in those tribes (forming a great majority) in which succession is only through women, only through the adoptive mother or the adoptive sister. In short, while he retains his subjection to the Territorial government (State or Federal, as the case may be), in all that relates to transactions outside of the tribe, so far as concerns transactions within the tribe, his allegiance is to the tribe, and he is governed exclusively by tribal law.

In addition to this, he becomes a member of the family by which he is specially adopted."

Whart. Confl. of Laws, § 252.

That Indians are not technically citizens, see *supra*, § 196; Whart. Com. Am. Law, § 434.

That Indians are not covered by the 14th and 15th amendments to the Constitution, *ibid.*, § 585; and see article in 15 Am. Law Rev., 21. *Supra*, § 196.

For an account of negotiations with the Indians of the Six Nations, in 1790 and 1791, see 2 Life of T. Pickering, 455, 493; 3 *ibid.*, 29, 65.

As to Indian citizenship, see article in 20 Am. Law Rev., 183; Mar., 1886.

That North American Indian tribes are to be classified with "half sovereign states," see Whart. Com. Am. Law, § 137.

"The right of the citizens of the United States to hold commerce with the aboriginal natives of the northwest coast of America, without the territorial jurisdiction of other nations, even in arms and ammunitions of war, is as clear and indisputable as that of navigating the seas."

Mr. Adams, Sec. of State, to Mr. Poletica, Mar. 30, 1822. MSS. Notes, For. Leg.

"The United States may as well undertake to maintain and hold political relation with the county of Galway, in Ireland, or the shire of Perth, in Scotland, as for England to maintain or hold such relation with any tribe of American Indians outside of her own colonial possessions in America."

Mr. Marcy, Sec, of State, to Mr. Dallas, July 26, 1856. MSS. Inst., Gr. Brit.

Indian tribes within the United States do not constitute foreign nations. They are regarded as in a state of pupilage, and may more correctly be denominated domestic dependent nations.

Cherokee Nation *v.* State of Georgia, 5 Pet., 1.

The United States consider the Indian nations as capable of maintaining the relations of peace and war, with theory of governing themselves, under their protection, and of making treaties with them. But the Indians are not treated as foreign nations, in the ordinary sense.

Worcester *v.* The State of Georgia, 6 Pet., 515.

The Cherokee Nation is not a foreign nation, but in its semi-civilized state bears a close analogy to a provisional government of a Territorial character.

Mackey *v.* Coxe, 18 How., 100.

Indian tribes are states in a certain sense, though not foreign states, or States of the United States, within the meaning of the second section of the third article of the Constitution, which extends the judicial power to controversies between a State and foreign states, etc.

Holden *v.* Joy, 17 Wall., 211.

In Crow Dog, *in re.*, 109 U. S., 556, it was held by the Supreme Court of the United States in 1883, that the United States courts have no jurisdiction of the murder of one tribal Indian by another.

An Indian who has voluntarily separated himself from a tribe recognized as such by the Government of the United States, and who has taken up his residence among the white citizens of a State, without being naturalized, taxed, or recognized as a citizen, either by the United States or a State, is not a citizen of the United States, under the fourteenth amendment.

Elk *v.* Wilkins, 112 U. S., 94 (approving McKay *v.* Campbell, 2 Sawyer, 118, 134; U. S. *v.* Osborne, 6 Sawyer, 406). See App., vol. iii, § 208.

The Cherokee Nation of Indians have not the right as an equal sovereign power to impose taxes on persons trading among them under the authority of the United States. Under treaty stipulations with the United States, Congress has the sole and exclusive right of regulating trade with them and managing their affairs as shall be deemed proper, and neither they, nor any other nation, can rightfully interfere with the exercise of this right.

Op., 645, Wirt, 1824.

The sovereignty of the United States over the territory ceded to the Choctaws has been only partially relinquished.

2 Op., 693, Butler, 1834.

A white man, although he may have been adopted by Chickasaws or Choctaws, does not become subject in criminal matters to the jurisdiction of the courts of the Choctaw Nation.

7 Op., 174, Cushing, 1855.

But in matters of civil jurisdiction arising within the nation its courts have jurisdiction over a white man who has voluntarily made himself a Chickasaw by intermarriage and exercise of all the rights of a Chickasaw, and where the question concerns property the proceeds of a head-right granted to him as a Chickasaw.

7 Op., 174, Cushing, 1855.

Indians are not citizens of the United States, but domestic subjects, and can be naturalized only by special act of Congress or by treaty.

7 Op., 746, Cushing, 1855.

The general laws of the United States do not apply to the Indians.

12 Op., 208, Stanbery, 1867.

"In a case decided by the Supreme Court in 1846 it was held: 'The native tribes who were found on the American continent at the time of its discovery have never been acknowledged or treated as independent nations by the European Governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole

continent was divided and parceled out and granted by the Governments of Europe as if it had been vacant and unoccupied lands and the Indians continually held to be and treated as subject to their dominion and control. The United States have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory. It is too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.' (The United States *v.* Rogers, 4 How., 572.) And in another case, in 1855, the court decided that 'the Cherokee country may be considered a Territory of the United States within the act of 1812, empowering any person or persons to whom letters testamentary or of administration have been, or may hereafter be, granted by the proper authorities in any of the United States or the Territories thereof, to maintain any suit, etc., in the District of Columbia. In no respect can it be considered a foreign state or territory, as it is within our jurisdiction and subject to our laws.' Mackey *v.* Coxe, 18 How., 104."

Lawrence's Wheaton (ed. 1863), 70.

"There is some analogy between the relation of the native states of India to Great Britain, and that of the Indian tribes of the United States. 'The native states of India are instances of protected dependent states maintaining the most valuable relations with the British Government under compacts with the East India Company. All these states acknowledge the supremacy of the British Government, and some of them admit its right to interfere so far in their internal affairs that the East India Company have become virtually sovereign over them. None of these, however, hold any political intercourse with one another or with foreign powers.' (Twiss, Law of Nations, i, 27.)"

Lawrence's Wheaton, (ed. 1863), 70, 71.

(2) CANNOT TRANSMIT TITLE.

§ 209.

As to title by discovery, see *supra*, § 2.

"The grounds of the claims of European nations to dominion over the Indian tribes in America have been so frequently, fully, and ably discussed in the courts of justice of the United States that it is unnecessary to expatiate on the subject. The cases relating to it are collected and a luminous abstract of them given in Kent's Commentaries, vol. 3, pp. 360 to 400. The following extract from the opinion of Chief-Justice Marshall in the case of Johnson *vs.* McIntosh is so very apposite to the

question respecting the Mosquito shore, and proceeds from so high an authority that it may with propriety be quoted here:

"'On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all, and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the New, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary in order to avoid conflicting settlements and consequent war with each other to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the Government by whose subjects or by whose authority it was made against all other European Governments, which title might be consummated by possession.

"'The exclusion of all other Europeans necessarily gave to the nation making the discovery, the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves and to the assertion of which by others all assented.

"'Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.' See also Jackson ex dem. Sparkman *vs.* Porter, 2 Paines' Circuit Courts Reports, 457."

Mr. Clayton, Sec. of State, to Mr. Squier, May 1, 1849. MSS. Inst., Am. States. See *supra*, § 2.

As to Mosquito Indian title, see *supra*, § 150*f*, *infra*, § 295.

Aboriginal inhabitants in a savage state have not such a title to the land where they dwell or roam as entitle them to confer it upon persons from another country.

Mr. Fish, Sec. of State, to Mr. Hackett, June 12, 1873. MSS. Dom. Let.

The Indian inhabitants of the United States are to be considered merely as occupants, to be protected, indeed, while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to others independent of territorial sovereignty.

Johnson *v.* McIntosh, 8 Wheat., 543.

The United States received from Great Britain by the treaty which terminated the Revolution a ratification of prior title to all the lands within their boundaries, subject only to the Indian right of occupancy. This is the doctrine asserted by the various European nations that ac-

quired territory on this continent anterior to the treaty with Great Britain, and is the spirit of the several compacts made with the Cherokees.

2 Op., 321, Borrien, 1830.

Grants made by Congress in lands reserved to the Indians by treaty are subject to the Indian right of occupancy, and can operate only after the extinguishment of the Indian title.

3 Op., 56, Butler, 1836; 3 Op., 205, Butler, 1837.

On the abandonment of their lands by Indian reservees, under the Creek treaty of 1814, the title becomes immediately vested in the United States by operation of law.

3 Op., 230, Butler, 1837.

Indians have not been conceded the national capacity to hold absolute title to lands, except in cases specially provided for by treaty, as in the case of the Choctaws and others; wherefore the title of the Brothertown Indians to the land secured to them by the treaties with the Menomonies is not a fee simple, but only such a right of occupancy as was previously possessed by the Menomonies themselves, subject to the general right of the United States to extinguish it by treaty with the Brothertown Indians.

3 Op., 322, Butler, 1838.

The removal of the Creek reservees from their reserved lands, without an intention of returning, is an abandonment which gives the right of possession and occupancy to the United States.

3 Op., 389, Grundy, 1838.

II. *TREATIES WITH.*

(1) MUST BE DULY SOLEMNIZED.

§ 210.

The questions relating to this topic are discussed, *mutatis mutandis*, *supra*, §§ 130 *ff.*

An Indian treaty is as much a law of the land, when duly solemnized, as is a treaty with a foreign power.

Turner *v.* Miss. Union, 5 McLean, 344.

When ratified in due form it is not competent for the court to inquire whether the tribe was properly represented by its headmen who were the parties.

Fellows *v.* Blacksmith, 19 How., 366.

Notwithstanding a conflicting State law, an Indian treaty operates until rescinded or abrogated by a new treaty, or by Congressional act, or by extinguishment of the object on which the treaty acted.

Love *v.* Pamplin, 21 Fed. Rep., 755.

(2) LIBERALLY CONSTRUED.

§ 211.

A treaty between the United States and the Cherokee tribe of Indians concerning lands is the contract of both parties, and its plain terms cannot be controlled by the acts of one of the agents of the United States.

Meigs *v.* McClung, 9 Cranch, 11.

A question of disputed boundary may be settled by the United States and an Indian tribe, between whom a previous treaty had been made, which left the boundary in some respects uncertain; and private rights are bound thereby.

Lattimer *v.* Potcet, 14 Pet., 4.

Notwithstanding the treaties of 1838 and 1842, between the Seneca Indians and the United States, by which they agreed to remove west of the Mississippi, no one can enforce their removal but the United States.

Fellows *v.* Blacksmith, 19 How., 366.

Such treaties are to be construed favorably, all other things being equal, to the Indian parties.

Kansas Indians, 5 Wall., 737.

Like other treaties, they are municipally repealed by subsequent legislation.

Cherokee Tobacco, 11 Wall., 616; aff., 1 Dill., 204; *supra*, § 138.

Where the right of an Indian tribe to the possession and use of certain lands, as long as it may choose to occupy the same, is assured by treaty, a grant of them, absolutely or *cum onere*, by Congress, to aid in building a railroad, violates an express stipulation; and a grant in general terms of "land" cannot be construed to embrace them.

Leavenworth, Lawrence and Galveston Railroad Co. *v.* U. S., 92 U. S., 733.

The act of March 3, 1863 (12 Stat. L., 772), to aid in the construction of certain railroads in Kansas, embraces no part of the lands reserved to the Great and Little Osages by the treaty of June 2, 1825 (7 Stat. L., 240), and the treaty concluded September 29, 1865, and proclaimed January 21, 1867 (14 Stat. L., 687), neither makes nor recognizes a grant of such lands. The effect of the treaty is simply to provide that any right of the companies designated by the State to build the roads should not be barred or impaired by reason of the general terms of the treaty, but not to declare that such rights existed.

Ibid.

It is competent for the United States, in the exercise of the treaty-making power, to stipulate, in a treaty with an Indian tribe, that, within

the territory thereby ceded, the laws of the United States, then or thereafter enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect until otherwise directed by Congress or the President of the United States. Such a stipulation operates *proprio vigore*, and is binding upon the courts, although the ceded territory is situate within an organized county of a State.

U. S. *v.* Forty-three Gallons of Whisky, &c., 93 U. S., 188.

The Seneca Indians must be protected in the enjoyment of exclusive possession of their lands as defined and bounded in the treaty of Canandaigua, until they have voluntarily relinquished it.

1 Op., 465, Wirt, 1821.

By the treaty with the Ottawas, the United States agreed with the Ottawas to pay to a certain person a certain sum of money. It was held that the money must be paid, without requiring proof of the justice of the claim.

2 Op., 562, Taney, 1833.

By a treaty with the Miami Indians, the United States agreed to grant to each of certain persons a section of land out of the territory ceded by the treaty. It was advised that no other parcels than those defined could be substituted for them.

2 Op., 563, Taney, 1833.

The Choctaws have no power to pronounce and execute sentence of death upon the slave of a white man residing among them, their power being limited by treaty with the United States to the Government of the Choctaw Nation of red men and their descendants.

2 Op., 693, Butler, 1834.

CHAPTER IX.

CLAIMS.

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I. *MODE OF PRESENTATION.*

(1) HOME CLAIMANT MUST MAKE OUT HIS CASE TO THE DEPARTMENT BY AFFIDAVIT OR OTHER PROOF.

§ 213.

"This Department cannot prefer any claim against a foreign Government unless all the facts and documents necessary to establish at least a *prima facie* case of its validity are previously submitted for consideration."

Mr. Buchanan, Sec. of State, to Mr. Eliot, May 20, 1847. MSS. Dom. Let.

As a basis of diplomatic intervention in claims on foreign Governments for redress or indemnity, it is necessary that there should be a petition to the Secretary of State, accompanied by a sworn statement in detail of the injury sustained, together with such other proof as can be secured sustaining the allegations of the petitions.

Mr. Marcy, Sec. of State, to Mr. Crain, Feb. 24, 1854. MSS. Dom. Let.

Unless irreparable or serious injury would follow from the delay, a minister of the United States is not at liberty to present to the Government to which he is commissioned a claim by a citizen of the United States without the prior approval of his own Government.

Mr. Marcy, Sec. of State, to Mr. Bowlin, Jan. 12, 1856. MSS. Inst., Colombia.

"It is not the province of the Department to designate the nature of the evidence on which claimants should substantiate their claim; it is

to be presumed, of course, that the same care will be taken to obtain the most positive proof of which the case is susceptible as if the claims were to be subjected to the scrutiny of a court of justice."

Mr. Marcy, Sec. of State, to Mr. Sanford, Mar. 22, 1856. MSS. Dom. Let.

The Department will not apply to a foreign Government to pay to a citizen of the United States damages for his unlawful arrest by such Government when there was a *prima facie* case sustaining such arrest.

Mr. Hale, Acting Sec. of State, to Mr. W. J. Hale, July 13, 1872. MSS. Dom. Let. Mr. Fish to Mr. Lazarus, Apr. 2, 1873; *ibid.*

"A substantial observance of the following rules by the claimant will facilitate the examination of the merits of the claim by the Department, and may tend to promote its early adjustment.

"1st. The memorial or petition should embody a concise and plain statement of the case, being particular in regard to dates of occurrence and in regard to the official station, if any, of the subjects or officers of the foreign Government who may have been engaged in the acts complained of. The petition should be attested by the oath of the claimant or the person representing the claimant.

"2d. The memorial should be supported by such proofs as the claimant may be able to furnish. If these consist of documents the original should be sent, and if any are in a foreign language, translations should accompany them; and if depositions of witnesses they must be under oath, otherwise they will not be considered.

"3d. The amount of the claim should be distinctly set forth, and if it consists of several distinct items, or grows out of several distinct transactions, the amount of each item and the dates of the various occurrences should be given."

Mr. Evarts, Sec. of State, to Mr. Ketcham, Feb. 23, 1881. MSS. Dom. Let.

"It is a well settled rule in this Department that no claim against a foreign sovereign will be entertained unless sustained by affidavits, or by written admissions by the sovereign on whom the claim was made. It is a rule in the Department equally well settled that a citizen of the United States cannot claim its interposition to enforce a contract with a foreign sovereign, unless, on his applying to that sovereign for redress, there was either a gross denial of justice or an unfair discrimination against the claimant on the ground of his nationality."

Mr. Bayard, Sec. of State, to Mr. Cox, Jan. 9, 1886. MSS. Inst., Turkey.

"You are right in asserting that this Department requires, as a condition precedent for the presentation of a claim to a foreign Government simply a *prima facie* case such as would authorize a chancellor to issue *ex parte* process, and that the case is not exhaustively examined on the merits until these merits are contested by the Government to whom the claim is presented. You are right, also, in assuming that unless the claimant's papers present such a *prima facie* case, the De-

partment will decline to present the claim. Ordinarily, it should be observed, it is a prerequisite to the presentation of such a claim by the Department, that it should be verified by affidavit or adequate documentary proof, but this condition is not insisted on when, on the facts set forth on the claimant's petition, it appears that, no matter how completely these facts are verified, he has not a *prima facie* case."

Mr. Bayard, Sec. of State, to Mr. Denby, Feb. 5, 1886. MSS. Inst., China. See App., vol. iii, § 213.

Circular in this relation by Department of State.

Citizens of the United States having claims against foreign Governments, not founded on contract, in the prosecution of which they may desire the assistance of the Department of State, should forward to the Department statements of the same, under oath, accompanied by the proper proof.

The following rules, which are substantially those which have been adopted by commissions authorized under conventions between the United States and foreign Governments for the adjustment of claims, are published for the information of citizens of the United States having claims against foreign Governments, of the character indicated in the above notification; and they are advised to conform as nearly as possible to these rules in preparing and forwarding their papers to the Department of State.

Each claimant should file a memorial, properly dated, setting forth minutely and particularly the facts and circumstances from which the right to prefer such claim is derived by the claimant. This memorial should be verified by his or her oath or affirmation.

The memorial and all the accompanying papers should be written upon foolscap paper, with a margin of at least one inch in width on each side of the page, as in this circular, so as to admit of their being bound in volumes for preservation and convenient reference; and the pages should succeed each other like those of a book, and be readable without inverting them.

When any of the papers mentioned in rule 11 are known to have been already furnished to the Department by other claimants, it will be unnecessary to repeat them in a subsequent memorial. A particular description, with a reference to the date under which they were previously transmitted, is sufficient.

Nor is it necessary, when it is alleged that several vessels have been captured by the same cruiser, to repeat in each memorial the circumstances in respect to the equipment, arming, manning, flag, &c., of such cruiser, which are relied upon as the evidence of the responsibility of a foreign Government for its alleged tortious acts. A simple reference to and adoption of one memorial in which such facts have been fully stated, will suffice.

It is proper that the interposition of this Government with the foreign Government against which the claim is presented should be requested in express terms, to avoid a possible objection to the jurisdiction of a future commission on the ground of the generality of the claim.

Claims of citizens against the Government of the United States are not generally under the cognizance of this Department. They are usually subjects for the consideration of some other Department, or of the Court of Claims, or for an appeal to Congress.

Rules.—In every memorial should be set forth—

1. The amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the facts and circumstances attending the loss or injury out of which the claim arises; the principles and causes which lie at the foundation of the claim.

2. For and in behalf of whom the claim is preferred, giving christian and surname of each in full.

3. Whether the claimant is now a citizen of the United States, and, if so, whether he is a native or naturalized citizen, and where is now his domicil; and if he claims in his own right, then whether he was a citizen when the claim had its origin, and where was then his domicil; and if he claims in the right of another, then whether such other was a citizen when the claim had its origin, and where was then and where is now his domicil; and if, in either case, the domicil of the claimant, at the time the claim had its orign, was in any foreign country, then whether such claimant was then a subject of the Government of such country, or had taken any oath of allegiance thereto.

4. Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and if any other person is or has been interested therein, or in any part thereof, then who is such other person, and what is or was the nature and extent of his interest; and how, when, and by what means and for what considerations the transfer of rights or interests, if any such was made, took place between the parties.

5. Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, has ever received any, and if any, what sum of money, or other equivalent or indemnification, for the whole or any part of the loss or injury upon which the claim is founded; and if so, when and from whom the same was received.

6. All testimony should be in writing, and upon oath or affirmation, duly administered, according to the laws of the place where the same is taken, by a magistrate or other person competent by such laws to take depositions, having no interest in the claim to which the testimony relates, and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate, or other person authorized to take such testimony, should be certified by him; and if not known, should be certified on the same paper upon oath by some other person known to such magistrate, having no interest in such claim, and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition should be reduced to writing by the person taking the same, or by some person in his presence having no interest, and not being the agent or attorney of any person having an interest, in the claim, and should be carefully read to the deponent by the magistrate before being signed by him, and this should be certified.

7. Depositions taken in any city, port, or place without the limits of the United States, may be taken before any consul or other public civil officer of the United States resident in such city, port, or place, having no interest, and not being agent or attorney of any person having an interest, in the claim to which the testimony so taken relates. In all other cases, whether in the United States or in any foreign place, the right of the person taking the same to administer oaths by the laws of the place must be verified.

8. Every affiant or deponent should state in his deposition his age, place of birth, residence, and occupation, and where was his residence and what was his occupation at the time the events took place in regard to which he deposes, and must also state if he have any, and if any, what interest, in the claim to support which his testimony is taken, and if he have any contingent interest in the same, to what extent, and upon the happening of what event, he will be entitled to receive any part of the sum which may be awarded. He should also state whether he be the agent or attorney of the claimant, or of any person having an interest in the claim.

9. Original papers exhibited in proof should be verified as originals by the oath of a witness, whose credibility must be certified as required in the sixth of these rules;

but when the fact is within the exclusive knowledge of the claimant, it may be verified by his own oath or affirmation. Papers in the handwriting of any one who is deceased, or whose residence is unknown to the claimant, may be verified by proof of handwriting, and of the death of the party, or his removal to places unknown.

10. All testimony taken in any foreign language and all papers and documents in any foreign language, which may be exhibited in proof should be accompanied by a translation of the same into the English language.

11. When the claim arises from the seizure or loss of any ship or vessel or the cargo of any ship or vessel, a certified copy of the enrollment or registry of such ship or vessel should be produced together with the original clearance manifests, and all other papers and documents required by the laws of the United States which she possessed on her last voyage from the United States, when the same are in the possession of the claimant or can be obtained by him, and when not, certified copies of the same should be produced, together with his oath or affirmation that the originals are not in his possession and cannot be obtained by him.

12. In all cases where property of any description for the seizure or loss of which a claim has been presented, was insured at the time of such seizure or loss, the original policy of insurance, or a certified copy thereof, should be produced.

13. If the claimant be a naturalized citizen of the United States a copy of the record of his naturalization duly certified should be produced.

14. Documentary proof should be authenticated by proper certificates or by the oath of a witness.

15. If the claimant shall have employed counsel the name of such counsel should, with his address, be signed to the memorial and entered upon the record, so that all necessary notices may be addressed to such counsel or agent respecting the case.

See Mr. Bayard, Sec. of State, to Mr. Buck, Oct. 27, 1885. MSS. Inst., For. Rel., 1885.

A report from Mr. Fish, Secretary of State, of December 12, 1874, giving returns from a series of foreign ministers on the subject of claims against Governments, is in House Rep. No. 134, 43d Cong., 2d sess. In the same report is given an argument on behalf of the bill for reference of international claims by the Secretary of State to the Court of Claims.

(2) FOREIGN CLAIMANT MUST APPEAR THROUGH DIPLOMATIC AGENCY.

§ 214.

A claim by a French citizen against the United States, when presented to the Department of State, must come through the diplomatic representation of France.

Mr. Seward, Sec. of State, to Mr. Fentenhime, Sept. 23, 1868. MSS. Dom. Let.

"The practice of this Government is only to consider the claims of foreign subjects when they are presented by the diplomatic representative of the country to which they belong."

Mr. Fish, Sec. of State, to Messrs. Coudert Bros., Apr. 21, 1869; *ibid.*

A claim "on behalf of foreign subjects of a foreign Government against the United States is, under the established rule of this Government, not

entitled to receive consideration unless a demand is made by the Government of the country of which the claimant is a subject or a citizen."

Mr. Frelinghuysen, Sec. of State, to Mr. Sypher, Apr. 3, 1883. MSS. Dom. Let.

"International law requires complaints on behalf of foreigners to come through their own Government."

Mr. Frelinghuysen, Sec. of State, to Mr. Hildrup, July 2, 1884. MSS. Dom. Let.

A citizen of one nation, wronged by the conduct of another nation, must seek redress through his own Government. His Government must assume the responsibility of presenting his claim, or it need not be considered.

U. S. *v.* Diekelman, 92 U. S., 520.

That diplomatic agents are not to be called on to take charge of private claims, see *supra*, § 99.

II. *WHO MAY CLAIM.*

(1) UNITED STATES CITIZENSHIP MUST BE SHOWN TO SUSTAIN CLAIM, AND SUCH CITIZENSHIP MUST HAVE EXISTED WHEN THE CLAIM ACCRUED.

§ 215.

As to proof of citizenship, see §§ 189 *ff.*

As to abandonment of citizenship, *supra*, §§ 178, 190.

As to German treaty, see *supra*, §§ 149, 173 *ff.*

An injury done to a claimant before he became a citizen of the United States cannot be the subject of diplomatic intervention by the Department.

Mr. Marcy, Sec. of State, to Mr. Ujhezi, Aug. 26, 1856. MSS. Dom. Let.

"The right to the protection of this Government may be acquired by birth, by naturalization, or in some cases and for some purposes by domicil in the United States. No other mode occurs to me, nor do I now perceive the authority of an officer of this Government, except in virtue of a treaty, or other positive legislation to bring a new subject within the sphere of its obligations. Least of all can I discern any faculty in a private citizen to spread the protection of his Government over a third person by adopting him as partner in a commercial establishment in foreign parts."

Mr. Fish, Sec. of State, to Mr. De Long, Sept. 19, 1871. MSS. Inst., Japan.

"It would be a monstrous doctrine which this Government would not tolerate for a moment, that a citizen of the United States, who might deem himself injured by the authorities of the United States or of any State, could, by transferring his allegiance to another power, confer

upon these powers the right to inquire into the legality of the proceedings by which he may have been injured while a citizen."

Mr. Fish, Sec. of State, to Mr. Bachiller, Apr. 8, 1874. MSS. Dom. Let. See further rulings to this effect, *infra*, § 231.

Claims maturing before citizenship are not subjects of interposition.

Mr. Fish, Sec. of State, to Mr. Sayler, May 12, 1876. MSS. Dom. Let.

"An assignment of a claim by a foreigner, or another Government, to a citizen of the United States, even if such claim be founded in tort, is not conceived to impose on this Government any obligation to interfere in behalf of such citizen, in respect of the Government against which the complaint is made. This rule, however, is especially applicable in matters of contract between a foreigner and another Government, or where a citizen of the United States becomes the assignee of the contract."

Mr. Evarts, Sec. of State, to Mr. Hodgskin, Oct. 25, 1877. MSS. Dom. Let. See same to same, Dec. 27, 1877; *ibid.*

Under the agreement of 1870–'71 between the United States and Spain, "the Spanish Government may traverse the allegation of American citizenship, and thereupon competent and sufficient proof thereof will be required." This agreement, which is to be collected from an exchange of notes, and "was not a treaty or convention subjected to the ratification of the Senate and the approval of the President, but an agreement between the secretary of foreign affairs of Spain, and the Secretary of State of the United States," which merely permits Spain to traverse the fact of naturalization, and does not permit her to go behind the certificate of naturalization and disprove the fact of the five years' residence.

Mr. Blaine, Sec. of State, to Mr. Hamlin, Dec. 6. 1881. MSS. Inst., Spain. See Mr. Frelinghuysen, Sec. of State, to Mr. Foster, Mar. 25, 1884; *ibid.*

As to impeaching naturalization, see *supra*, § 174*a*.

"The position that the claimant is not entitled to redress, because, though the confiscation and appropriation of the proceeds of the estate took place after he became a citizen of the United States, the embargo was laid before that citizenship was perfected, cannot be maintained. Both by the Roman and the English common law, it is an established principle (as is more fully illustrated in the report of the solicitor, of which I inclose a copy) that where an injurious procedure is put in motion in such a way as to have a continuous effect, liability for the effect is not barred by the circumstance that when the procedure was started, no liability could be maintained. And in this case, while the original embargo was laid before the claimant's citizenship was perfected, it is otherwise with the confiscation and subsequent enormous appropriation of the revenues of the estates. These were subsequent to the per-

fection of Mr. Mora's citizenship, and aside from the point above given the Spanish Government is liable for them, as for distinct acts of injury."

Mr. Bayard, Sec. of State, to Mr. Curry, Jan. 22, 1886. MSS. Inst., Spain.

"In the first place, the claim is for remuneration for losses incurred in an investment purely speculative, in purchasing what remained of the wreck of a British vessel. The purchase by the petitioner was on June 14, 1885, he no doubt supposing at the time that the vessel was in a condition which made the purchase on his part an operation likely to turn out very advantageously to him. It appeared, however, that the day before the purchase the vessel had been gutted by Chinese marauders, who, it is alleged, had access to the vessel through the neglect of the Chinese Government. Now, supposing that such neglect imposed on the Chinese Government a liability to make good to the owners of the vessel the losses thereby sustained by them, which, however, we have no reason on the facts to assume, yet we must recollect that the petitioner bought the vessel as she was at the time of purchase and can only claim for damages subsequently accruing.

"In the second place, even assuming that the owners had a claim against the Chinese Government, and that this claim passed to the petitioner, yet it is a settled rule in this Department that a claim which the Department cannot take cognizance of in its inception because of the alienage of the creditor, is not brought within the cognizance of the Department by its assignment to a citizen of the United States."

Mr. Bayard, Sec. of State, to Mr. Denby, Feb. 5, 1886. MSS. Inst., China.

"Subsequent naturalization does not alter the international status of a claim which accrued before naturalization."

Mr. Bayard, Sec. of State, to Mr. Golding, Apr. 30, 1886. MSS. Dom. Let.

On the subject of the impeachability of certificates of naturalization, see *supra*, § 174*a*.

As to condition of matriculation, see *supra*, § 172*a*.

(2) A CITIZEN WHO HAS VOLUNTARILY EXPATRIATED HIMSELF CANNOT CLAIM THE INTERPOSITION OF THE DEPARTMENT.

§ 216.

The rulings on this topic are collected *supra*, § 190. See also *supra*, § 176.

"Lord Castlereagh distinctly said that the grounds on which these two subjects (Arbuthnot and Ambrister) had been considered by the Cabinet as having forfeited the rights of protection from their Government were, that they had identified themselves, in part at least, with the Indians, by going amongst them with other purposes than those of innocent trade; by sharing in their sympathies too actively, when they were on the eve of hostilities with the United States; by feeding their complaints; by imparting to them counsel; by heightening their resent-

ments, and thus at all events increasing the predispositions which they found existing to the war, if they did not originally provoke it."

Mr. Rush, minister at London, to Mr. Adams, Sec. of State, Jan. 25, 1819. MSS. Dispatches, Gr. Brit.

As to Arbuthnot and Ambrister, see further, §§ 190, 243, 348*a*.

(3) CORPORATIONS.

§ 217.

"When a corporation has been injured by a tort or a breach of a contract, or has any right of action, legal or equitable, against a party, it seems clear that an individual shareholder cannot prosecute that cause of action because the corporation fails or refuses to do so.

"Redress must be sought through the board of directors of the company, or by vote of the stockholders, or by other remedies provided by the charter, or by the laws of the company."

Mr. Frelinghuysen, Sec. of State, to Mr. Phelps, Dec. 6, 1884. MSS. Inst., Peru.

But when individual shareholders, citizens of the United States abroad, are denied justice in foreign courts, this Government may intervene. *Infra.* § 230.

As to the right of United States stockholders in a foreign corporation to claim the interposition of the United States in favor of a claim for injury sustained from a foreign Government, see instructions of Mr. Seward, Sec. of State, to Mr. Burton, Apr. 27, 1866. MSS. Inst., Colombia.

That foreign corporations are presumed to be aliens, see *supra*, § 207.

III. *PRACTICE AS TO PROOF AND PROCESS.*

(1) DEPARTMENT CANNOT EXAMINE WITNESSES UNDER OATH.

§ 218.

"The Executive Government is not furnished with the means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examiuation of parties and witnesses. The authority for such an investigation must proceed from Congress."

Mr. Seward, Acting Sec. of State, to Mr. Zamacona, Aug. 20, 1879. MSS. Notes, Mex.

It can, however, determine as to the presentation of a case to a foreign sovereign on affidavits and other proof, and, when negotiating with a foreign Government as to the compromise of a claim, may examine the whole case presented, whether on affidavits, documents, or oral admissions.

See *supra*, § 213.

As to letters to Mr. Broadhead, in reference to mission, in 1885, in respect to French spoliation documents, see Mr. Bayard, Sec. of State, to Mr. Broadhead, April 9, 1885, and subsequent dates. MSS. Notes, Special Missions. Mr. Bayard to Mr. Tuck, Nov. 16, 1885; *ibid.*

Whenever the law makes it the duty of an officer to examine, adjust, and settle claims against the Government, authority is impliedly given to him to require such claims to be supported by the oaths of witnesses where the facts necessary to establish them rest on testimony.

14 Op., 419, Williams, 1874.

The act of 1871 (16 Stat., L. 412; Rev. Stat. L., § 184) assumes the existence of authority in the heads of Departments and bureaus to require oaths in cases of claims against the Government, and provides them with a very efficient means of enforcing it.

Ibid.

The records of an Executive Department need not be produced in evidence in court, but their contents may be shown by authenticated copies.

Nock's case, 2 C. Cls., 451.

For argument in favor of the establishment of a "Court of Alien Claims," see letter of Mr. Fish, Sec. of State, to Mr. Lawrence, of House Committee of Foreign Affairs, Feb. 27, 1874. MSS. Report Book.

(2) NO PEREMPTORY DEMAND TO BE MADE UNLESS UNDER INSTRUCTIONS FROM THE DEPARTMENT.

§ 219.

"No diplomatic agent of this Government is authorized, without instructions to that effect, to use any other means than respectful argument or persuasion, orally or in writing, for the purpose of inducing a foreign Government to adjust claims of citizens of the United States; nor is he authorized to use threatening language for such a purpose without express instructions. No such agent ought, without similar instructions, to interfere officially in a case of an alleged breach by a foreign Government of a contract with citizens of the United States, and it is apprehended that it would at least be difficult to find an instance where such an instruction has been given by this Department. The reason for this is obvious. It does not comport with the dignity of any Government to make a demand upon another which might not ultimately, on its face, warrant a resort to force for the purpose of compelling a compliance with it. Such a course cannot, under this Government, be adopted without authority from Congress, and it is almost impossible to imagine any contract or any circumstances attending the infraction of one by a foreign Government which would induce Congress to confer such an authority upon the President."

Mr. Marcy, Sec. of State, to Mr. Clay, May 24, 1855. MSS. Inst., Peru.

As to limits of authority of diplomatic representative, see Mr. Blaine, Sec. of State, to Mr. Hurlbut, Dec. 3, 1881. MSS. Inst., Peru; For. Rel., 1881.

As to discretionary power of the Government as to such claims, see *infra*, § 248.

(3) DEPARTMENT HAS CONTROL OF CASE, AND MAY ARBITRATE, COMPROMISE, OR WITHDRAW.

§ 220.

"It is essential to the dignity of a State that it should consult its own convenience in preferring complaints of this character. This by no means implies a necessity for trenching upon the just prerogatives of the debtor Government. On the contrary, the delay may, and often does, spring principally from a regard to the circumstances of the debtor Government itself."

Mr. Clayton, Sec. of State, to Mr. Van Alen, July 10, 1849. MSS. Inst., Ecuador.

"Mr. Carvallo appears to think that the Government of the United States, having made this claim a public question between itself and the Government of Chili, ought not to be influenced by the opinions and wishes of the claimants, as to the course to be pursued in settling it. But while the Government of the United States no doubt ought to reserve, and certainly will reserve to itself the right of pursuing such a course as a wise regard to the public interests requires, yet having originally taken up the subject at the instance of the claimants, and for their benefit, it would be altogether inexpedient to pursue it, without the attempt at least to obtain their consent beforehand to the measures adopted. A contrary course would be imprudent in itself, and might lay the foundations for an onerous demand upon Congress. The high character and unquestioned probity of the principal claimant makes this course, which would always be that of prudence, almost incumbent on this Department upon the present occasion."

Mr. Everett, Sec. of State, to Mr. Carvallo, Feb. 23, 1853. MSS. Notes, Chili.

"There is an important misapprehension in Mr. Carvallo's note which it is necessary to correct. The undersigned has never said that it was 'indispensable to obtain the consent of the claimants in order to make a convention;' but that it was inexpedient to take an important step without attempting at least to obtain their consent; and this remark was qualified by saying that the Government of the United States reserved to themselves the right of pursuing such a course as was required by a wise regard to the public interests."

Mr. Everett, Sec. of State, to Mr. Carvallo, Mar. 3, 1853. MSS. Notes, Chili.

The Department will not present to a foreign Government claims for damages which, though based on a wrong actually done, are speculative and exorbitant in amount.

Mr. Marcy, Sec. of State, to Mr. Munro, Jan. 10, 1856. MSS. Dom. Let.

"Nations cannot afford to have the intercourse which the interests of their citizens require to be kept open, subjected to the annoyances and risks which would result from the admission of fraud or duplicity into such intercourse. It has therefore become a usage, having the authority

of a principle, in the correspondence between enlightened Governments, in relation to the claims of citizens or subjects, that any deception practiced by a claimant upon his own Government in regard to a controversy with a foreign Government, for the purpose of enhancing his claim, or influencing the proceedings of his Government, forfeits all title of the party attempting such deception to the protection and aid of his Government in the controversy in question, because an honorable Government cannot consent to complicate itself in a matter in which it has itself been made or attempted to be made the victim of a fraud, for the benefit of the dishonest party."

Mr. Seward, Sec. of State, to Lord Lyons, May 30, 1862. MSS. Notes, Gr. Brit.

"Mr. Dalla Costa, the Venezuelan minister, called upon me on the 27th ultimo, and it may be important that you be advised of the purport of the conversation. * * * He then said that President Blanco was very much disturbed by the language of the President's messages to Congress on the subject of the claims against Venezuela.

"I expressed surprise, as the language of the President had, in my opinion, been very moderate considering the conduct of Venezuela; and that unless a different course was pursued by Venezuela I thought he might expect much more decided language, if not anticipated by action on the part of the President before the next Congress should adjourn. That the United States felt deeply aggrieved by the course of Venezuela in refusing compliance with the obligations of the treaty, and with the awards of the arbitrators to which the claims had been solemnly referred.

* * * * * * *

"That if a state, after having submitted a controversy regarding claims and debts due to individuals, to arbitration, whether by another state or by a commission, refuses to pay the award, it loses credit and leaves no alternative with other powers than that of refusing intercourse, or of an ultimate resort to war." * * *

Mr. Fish, Sec. of State, to Mr. Russell, June 4, 1875. MSS. Inst., Venez.; For. Rel., 1875. See *supra*, § 165*a*.

"The diplomatic abandonment of the claims by their own Government, especially if accompanied by the characterization contained in the proposed preamble, could not fail to prove a serious obstacle to the success of any efforts which the parties, whose claims have heretofore been presented, might make to secure redress through the judical tribunals, a source from which, under the most favorable circumstances, the claimants would seem to have little to hope for."

Mr. Fish, Sec. of State, to Mr. Logan, Dec. 20, 1875. MSS. Inst., Chili.

"Much delay (consequent upon accusations of fraud in some of the awards) has occurred in respect to the distribution of the limited amounts received from Venezuela under the treaty of April 25, 1866, applicable to the awards of the joint commission created by that treaty. So long as these matters are pending in Congress the Executive cannot

assume either to pass upon the questions presented, or to distribute the fund received. It is eminently desirable that definite legislative action should be taken, either affirming the awards to be final, or providing some method for re-examination of the claims. Our relations with the Republics of Central and South America, and with the Empire of Brazil, have continued without serious change, further than the temporary interruption of diplomatic intercourse with Venezuela and with Nicaragua. Amicable relations have already been fully restored with Venezuela, and it is not doubted that all grounds of misunderstanding with Nicaragua will speedily be removed. From all these countries there are favorable indications of a disposition on the part of their Governments and people to reciprocate our efforts in the direction of increased commercial intercourse."

President Hayes, First Annual Message, 1877. See *supra*, § 165*a*.

The Government of the United States has control over all awards made to citizens of the United States through the agency of international commissions, and may take such action in relation thereto, when they are impeached, as may be most consistent with national honor and duty.

Mr. Evarts, Sec. of State, to Mr. Zamacona, Aug. 20, 1879. MSS. Notes, Mex. See Mr. Evarts to Mr. Navarro, Aug. 4, 1880; *ibid.*

As to effect of international arbitration, see *infra*, §§ 221, 316.

As to Venezuela claims, the following documents may be consulted:

Amount of money in Department of State on account of awards. President Grant's message of May 19, 1876. Senate Ex. Doc. 66, 44th Cong., 1st. sess.

Review of the action of the commissioners and of the umpire. Fraudulent character of the claims awarded by the commission. Reviews the action of Congress with respect to the commission. Evidence taken before the committee, and correspondence between United States and Venezuela. List of awards and of persons to whom certificates were issued. House Rep. 787, 44th Cong., 1st sess.

President Hayes's message, January 10, 1878. House Ex. Doc. 30, 45th Cong., 2d sess.

Testimony taken by Committee on Foreign Affairs. House Mis. Doc. 30, 45th Cong., 2d sess.; House Miss. Doc. 11, 45th Cong., 2d sess.

Report of Committee on Foreign Affairs. House Rep. 702, 45th Cong., 2d sess.

Majority report. House Rep. 803, 45th Cong., 2d sess. Part II, Minority report.

Statement of the moneys received and disbursed. Correspondence. Subject of compelling Venezuela to pay the balance due referred to Congress. President Hayes' message of March 29, 1880. Senate Ex. Doc. 121, 46th Cong., 2d sess.

Claim of Beales, Nobles & Garrison against Venezuela. Papers in the case, including the contract, evidence, affidavits, proofs, and decision of the commission and umpire, transmitted May 13, 1880. House Mis. Doc. 42, 46th Cong., 2d sess.

Report adverse to their submission to a new commission, but in favor of their submission to the Court of Claims. House Rep. 327, 46th Cong., 3d sess.

Report of Committee on Foreign Relations, that the Court of Claims cannot be clothed with power to annul the action of the Venezuela Commission, but that Secretary of State has full authority to distribute said awards. Senate Rep. 311, 47th Cong., 1st sess.

The question referring seven of the awards to the Court of Claims; if no action is taken by the present Congress the President will recognize the absolute validity of all awards. President Arthur's message of May 25, 1882, House Ex. Doc. 208, 47th Cong., 1st sess.

Report submitting a resolution authorizing the President to negotiate for a new claims commission to meet at Washington. House Rep. 1750, 47th Cong., 1st sess.

Amount of money received by the Department of State on account of awards, and its distribution. President Arthur's message of June 30, 1884. House Ex. Doc. 174, 48th Cong., 1st sess.

Congress having unanimously requested the President to reopen the claims treaty with Venezuela, a treaty to this effect was signed, and, with some modifications, ratified by the Senate in 1886.

"The Secretary of State, to whom was referred the following resolution of the Senate of the 27th of February, 1880—

"*Resolved*, That the President be requested, if in his opinion not inconsistent with the public service, to inform the Senate what action, if any, has been taken by him under authority of section 5 of the act approved June 18, 1878, entitled 'An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th day of July, 1868,' and of the grounds of such action, and what further action, if any, the honor of the United States may, in his opinion, require to be taken in the premises—

"Has the honor to report.

"The act passed by Congress 'to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th day of July, 1868,' contained the following section:

"SEC. 5. And whereas the Government of Mexico has called the attention of the Government of the United States to the claims hereinafter named with a view to a rehearing; therefore, be it enacted that the President of the United States be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct; and, in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards, respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed, as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them.

"It having been referred by you to the Department of State to institute the investigation required by this action, I gave the subject the most careful examination. I reviewed the proceedings of the commission, including the testimony originally submitted, the arguments made by the counsel both for the Republic of Mexico and the United States, the opinions of the members of the commission, and the final decision

of the umpire. I considered the representations of the Mexican Government, as set forth in its diplomatic communications to this Department, and subjected to patient scrutiny the supplemental evidence by which those representations had been supported. In addition to this, I heard counsel both for the Mexican Government and the parties interested in these awards.

"The most impressive complaint of the Mexican Government in the La Abra case bore upon the award of damages as fraudulently exaggerated.

"In the Weil case, the Government of Mexico asserts that no such case had ever had any real existence; that there never was any such property as is alleged to have been seized; that the parties claimant never owned, directly or as agents, any such property; that the seizure of the property is in all its details a pure fiction, and that the evidence by which the whole claim is established is spurious and corrupt.

"Upon these complaints, and the examination given to them as above set forth, on the 8th of August last I reported to you my conclusions as to the proper disposition of the matter by the Executive Government, as follows:

"First. I am of opinion that, as between the United States and Mexico, the latter Government has no right to complain of the conduct of these claims before the tribunal of commissioners and umpire provided by the convention, or of the judgments given thereupon, so far as the integrity of the tribunal is concerned, the regularity of the proceedings, the full opportunity, in time and after notice, to meet the case of the respective claimants, and the free and deliberate choice exercised by Mexico as to the methods, the measure, and the means of the defense against the same.

"I conclude therefore, that neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the awards in these cases should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico.

"Second. I am, however, of opinion that the matters brought to the attention of this Government on the part of Mexico do bring into grave doubt the substantial integrity of the claim of Benjamin Weil, and the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of the La Abra Silver Mining Company, and that the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this Government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud.

"If such further investigations should remove the doubts which have been fairly raised upon the representations of Mexico, the honor of the United States will have been completely maintained. If, on the other hand, the claimants shall fail in removing these doubts, or they should be replaced by certain condemnation, the honor of the United States will be vindicated by such measures as may then be dictated.

"Third. The Executive Government is not furnished with the means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses. The authority for such an investigation must proceed from Congress. I would advise, therefore, that the proofs and the conclusions you shall come to thereon, if adverse to the immediate payment on these awards of the installments received from Mexico, be laid before Congress for the exercise of their plenary authority in the matter.

"Fourth. It may be that, as the main imputation in the case of the La Abra Silver Mining Company is of fraudulent exaggeration of the claim in its measure of damages, it may consist with a proper reservation of further investigation in this case to make the distribution of the installments in hand.

"I have this subordinate examination still under examination, and, should you entertain this distinction, will submit my further conclusions on this point.

"These conclusions having been approved by you, and the point reserved for further consideration in the La Abra case having again been referred to me, on the 3d of September last I reported to you my conclusions upon the same as follows:

"The parties interested in the case of the La Abra Mining Company having desired from you a further consideration of the point reserved in my former statement to you of my views in that case, and the matter having been referred to me to that end, I respectfully submit my conclusion on that point.

"1. Upon a renewed examination of the matter as laid before me by the Mexican Government, I am confirmed in the opinion that the proper limits of the further consideration which the honor of the Government should prompt it to give to this award should confine the investigation to the question of a fraudulent exaggeration of the claim by the parties before the commission to which, under the provision of the convention, it was presented by this Government.

"2. Upon a careful estimate as to any probable or just reduction of the claim from further investigation, should Congress institute it, and under a sense of the obligation of the Executive Government to avoid any present deprivation of right which does not seem necessary to ultimate results, I am of opinion that its distributive share of the installments thus far received from Mexico may properly be paid to the claimant, reserving the question as to later installments.

"If this conclusion should require your approval, the payment can be made upon the verification at the Department of State of the rightful parties to receive it.

"This latter conclusion having also received your approval, and the results stated in both these reports having been communicated both to the Mexican Government and the claimants, the payment was made upon the La Abra award of the distributive share of the installments then in hand, and payment was withheld of the distributive share of such installments upon the Weil award.

"The parties interested in these awards have from time to time preferred requests for a renewed consideration by the Executive of the questions arising for his determination under the act of Congress of June 18, 1878, and have particularly insisted that, in deciding against opening these awards diplomatically and re-examining them by a new international commission, the whole discretion vested in the Executive as a part of the treaty-making power and under the special provision of the act of Congress was exhausted, and that the payments should be no longer suspended in respect to these cases, or either of them. A solicitous attention to the rights of the claimants and the duty of the Executive in the premises has confirmed me in the opinion that Congress should determine whether 'the honor of the United States' requires any further investigation in these cases, or either of them, and provide the efficient means of such further investigation, if thought necessary.

"In the conclusions to which I came, and which I had the honor to submit to your examination, I was principally governed by the following considerations:

"1. In the complaints of the Mexican Government there is not the slightest impeachment, express or implied, of the character or composition of the commission, of its methods of procedure, or of the entire regularity and integrity of its actual proceedings. It was composed of able and eminent men, enjoying the full confidence of the Governments by whom they were respectively appointed, and the umpire selected, Sir Edward Thornton, was pre-eminently fitted for his laborious and responsible duties by his long diplomatic experience, his recognized ability, his high character, and his special knowledge of the two countries whose citizens and Governments were interested in the arbitration.

"2. Before this commission the Government of Mexico had full opportunity and ample time to present its defense, both in evidence and argument, against any claim that was submitted. In the La Abra case a large amount of testimony was taken on both sides, the comparison, and valuation of which was within the power of the commission, and the opinion of the umpire shows that it was carefully considered.

"In the Weil case, it is true that the Mexican Government submitted no testimony, and that the case was decided upon the evidence offered by the claimants. But the Mexican commissioner explicitly declined the offer of further time to produce such testimony, although he professed that his Government had such in possession, saying upon the trial:

"There is in the present case the still more serious consideration that there is sufficient evidence upon which to judge of the claim, and that by opening the door to new testimony it would only serve to show the claimant wherein the edifice which he had erected upon his imagination was weak, and by enlightening him how to crown his intrigue by new efforts, which, although they would not change the aspect of the case, might lead him to confirm it.

"3, The treaty under the provisions of which the commission was appointed was explicit in recognition of the finality of its action. By Article II of that convention, the two Governments bound themselves to consider the decisions of the commissioners and of the umpire as absolutely final and conclusive, and to give full effect to such decisions without any objection, evasion, or delay whatsoever; and, by the fifth article the high contracting parties agree to consider the result of the proceedings of the commission as a full, perfect, and final settlement of every claim upon either Government arising from the transactions prior to the exchange of ratifications thereof.

"4. Aside from this special provision of the finality of the decision of the commission, in the very act of its creation, it would seem impossible to review and retry any individual case without opening the door to other reclamations of the same sort. In addition to these cases, with the result of which the Mexican Government is dissatisfied, there

are many others which failed of preparation in time, which were rejected on principles not always acquiesced in by those interested, and some in which the claimants deemed the awards very insufficient. The adherence of the Government of the United States to the strict letter of its convention that the decision of the commissioners should be absolutely final in every case, and a complete bar to any claim arising from transactions prior to its ratification, has hitherto prevented any effort on the part of this Government to renew such discussion in favor of its citizens. But if it be once admitted that for any reason short of an impeachment of the integrity of the commission its proceedings can be reopened for review and its decisions for reversal, there will not be wanting numerous urgent appeals to the justice and sympathy of the Government to extend this measure of relief to many who think that their claims have been erroneously estimated or rejected.

"Lastly. The principle of the settlement of international differences by arbitral commissions is of such deep and wide-reaching interest to civilization, and the value of such arbitration depends so essentially upon the certainty and finality of its decision, that no Government should lightly weaken its influence or diminish its consideration by making its action the subject of renewed discussion. It is only in extreme cases, where the commission is itself charged with corruption, or where it has clearly exceeded its powers in deciding matters not submitted to its judgment, that prompt and cheerful acquiescence should not be rendered to its action. No such charge is here suggested. It may be true that in this or that instance more adequate justice might have been rendered. The methods and processes of such tribunals, which in time it may be confidently hoped will be improved and perfected, are not yet so complete as to eliminate much opportunity of error. But the results of such an arbitration, covering, as this did, large, complicated, and numerous transactions, deciding not upon oral testimony winnowed by cross-examination, but upon the contradiction of vague affidavits, cannot be fairly judged by the apparent errors of this or that individual case. There is, probably, no just ground for saying that the aggregate of the awards against Mexico more than equaled the just claims of our citizens, and much complaint has been made that such aggregate falls quite short of them. But the awards made by this commission were something more than the settlement of mere private claims; it was the adjustment of long-standing national differences. And if in the result more or less was added to or taken from particular awards, still if on the whole a fair and just balance has been struck; if, considering all that has been given and all that has been refused, the examination has been careful and the judgment impartial, it is the interest and the duty of Governments to maintain it.

"While these considerations led to the conclusion that these cases ought not to be made the subject of a new international commission, I was yet of opinion that 'the honor of the United States' was concerned

to inquire whether in these cases, submitted by this Government to the commission, its confidence had been seriously abused, and the Government of Mexico, acting in good faith in accepting a friendly arbitration, had been subjected to heavy pecuniary imposition by fraud and perjury in the maintenance of these claims, or either of them, before the commission. In furtherance, however, of this opinion, it seemed to me apparent that the Executive discretion under the act of Congress could extend no further than to withhold further payments on the awards until Congress should, by its plenary authority, decide whether such an investigation should be made, and should provide an adequate procedure for its conduct, and prescribe the consequences which should follow from its results.

"Unless Congress should now make this disposition of the matter, and furnish thereby definite instructions to the Department to reserve further payments upon these awards till the conclusion of such investigation, and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration, and proceed in the payment of the same pro rata with all other awards under the convention."

Mr. Evarts, Sec. of State, report to President, Apr. 13, 1880; transmitted by President Hayes to Congress, Apr. 15, 1880. Senate Ex. Doc. 150, 40th Cong., 2d sess.

If the Government of the United States is convinced that an award in its favor by an international commission is tainted with fraud, it will take measures to have the award set aside.

Mr. J. Davis, Asst. Sec. of State, to Mr. Camp, Sept. 23, 1882. MSS. Dom. Let. See *infra*, §§ 221, 316.

"It may be here observed that this Government exercises a broad discretion in determining what claims it will diplomatically present against other nations. It has not lent, and will not lend, its influence in favor of fraudulent claims. And when in behalf of an individual this Government demands of another power payment of money, it should not close its doors against an investigation into the question whether the apparent title of the claimant to the money is valid, or, because of his own fraud, is void. Were the case reversed, this Government would contend for that right. Any other doctrine must impair the dignity and imperil the rights of those who have honestly obtained American citizenship."

Mr. Frelinghuysen, Sec. of State, to Mr. Suydam, Sept. 25, 1882. MSS. Dom. Let.

The President, even without the action of Congress, possesses full authority to agree to rescind, on account of fraud, any award in favor of the United States by an international commission.

Mr. Frelinghuysen, Sec. of State, to Mr. Brewster, Dec. 4, 1882. MSS. Dom. Let. As to such commissions, see *infra*, § 221.

Where a grossly inadequate sum is offered by a foreign Government in payment of a claim admitted by it to be due to a citizen of the United States, the Government of the United States may fix a sum whose payment it demands as an ultimatum.

Mr. Frelinghuysen, Sec. of State., to Mr. Osborne, Oct. 18, 1883. MSS. Inst., Arg. Rep. See further, same to same, Apr. 21, 1884; *ibid.*

"A convention was signed with Mexico on July 13, 1882, provlding for the rehearing of the cases of Benjamin Weil and the Abra Silver Mining Company, in whose favor awards were made by the late American and Mexican Claims Commission. That convention still awaits the consent of the Senate. Meanwhile because of those charges of fraudulent awards which have made a new commission necessary, the Executive has directed the suspension of payments of the distributive quota received from Mexico."

President Arthur, Third Annual Message, 1883.

"The claims presented to the French commission are not private claims but governmental claims, growing out of injuries to private citizens or their property, inflicted by the Government against which they are presented. As between the United States and the citizen, the claim may in some sense be regarded as private, but when the claim is taken up and pressed diplomatically, it is as against the foreign Government a national claim.

"Over such claims the prosecuting Government has full control; it may, as a matter of pure right, refuse to present them at all; it may surrender them or compromise them without consulting the claimants. Several instances where this has been done will occur to you, notably the case of the so called 'French spoliation claims.' The rights of the citizen for diplomatic redress are as against his own not the foreign Government. For the claims within its jurisdiction the commission stands in the place of the diplomatic departments of the two countries, and the respective agents and counsel represent, not the claimants, but their respective Governments, and it is of the utmost importance to frankness, fair and upright dealing between the two nations, that the agents and counsel should not in any manner be interested in the cases which they present or defend. The commission is not a judicial tribunal adjudging private rights, but an international tribunal adjudging national rights."

Mr. Frelinghuysen, Sec. of State, to Messrs. Mullan & King, Feb. 11, 1884. MSS. Dom. Let.

As to international commissions, see further, *infra*, §§ 221, 316.

"It is my duty to draw your attention to the present status of the negotiations between the Governments of Mexico and the United States, in relation to the reopening and retrying of the claims of Benjamin Weil and La Abra Silver Mining Company against Mexico,

"On the 4th of July, 1868, a treaty between the United States and Mexico, providing for the adjustment of the claims of either country against the other, was concluded, and by and with the advice and consent of the Senate was proclaimed by the President, February 1, 1869.

"By Article I of this treaty it was provided as follows:

"All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of the Mexican Republic arising from injuries to their persons or property by authorities of the Mexican Republic, and all claims on the part of corporations, companies, or private individuals, citizens of the Mexican Republic upon the Government of the United States, arising from injuries to their persons or property by authorities of the United States, which may have been presented to either Government for its interposition with the other since the signature of the treaty of Guadalupe-Hidalgo between the United States and the Mexican Republic of the 2d of February, 1848, and which yet remain unsettled, as well as any other such claims which may be presented within the time hereinafter specified, shall be referred to two commissioners, one to be appointed by the President of the United States, by and with the advice and consent of the Senate, and one by the President of the Mexican Republic. In case of the death, absence, or incapacity of either commissioner, or in the event of either commissioner omitting or ceasing to act as such, the President of the United States or the President of the Mexican Republic, respectively, shall forthwith name another person to act as commissioner in the place or stead of the commissioner originally named.

"The commissioners so named shall meet at Washington within six months after the exchange of the ratifications of this convention, and shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to public law, justice, and equity, without fear, favor, or affection to their own country, upon all such claims above specified as shall be laid before them on the part of the Governments of the United States and of the Mexican Republic, respectively; and such declaration shall be entered on the record of their proceedings.

"The commissioners shall then name some third person to act as an umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person, and in each and every case in which the commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be umpire in that particular case. The person or persons so to be chosen to be umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the commissioners, which shall be entered on the record of their proceedings. In the event of the death, absence, or incapacity of such person or persons, or of his or their omitting, or declining, or ceasing to act as such umpire, another and different person shall be named, as aforesaid, to act as such umpire in the place of the person so originally named, as aforesaid, and shall make and subscribe such declaration as aforesaid.

"By other articles of the treaty the appointment of commissioners and of an umpire was provided for, and the decisions of such commissioners conjointly, or of the umpire, were made absolutely final and conclusive.

"Article II was as follows:

"The commissioners shall then conjointly proceed to the investigation and decision of the claims which shall be presented to their notice, in such order and in such manner as they may conjointly think proper, but upon such evidence or information only as

shall be furnished by or on behalf of their respective Governments. They shall be bound to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective Governments in support of or in answer to any claim, and to hear, if required, one person on each side on behalf of each Government on each and every separate claim. Should they fail to agree in opinion upon any individual claim, they shall call to their assistance the umpire whom they have agreed to name, or who may be determined by lot, as the case may be; and such umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person on each side as aforesaid, and consulted with the commissioners, shall decide thereupon finally and without appeal. The decision of the commissioners and of the umpire shall be given upon each claim in writing, shall designate whether any sum which may be allowed shall be payable in gold or in the currency of the United States, and shall be signed by them respectively. It shall be competent for each Government to name one person to attend the commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

"The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever.

"It is agreed that no claim arising out of a transaction of a date prior to the 2d of February, 1848, shall be admissible under this convention.

"Article V further provided:

"The high contracting parties agree to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

"The claims of Weil and La Abra Company were duly presented and awards made in favor of each.

"On the 18th of June, 1878, Congress passed an act (20 Stat. L., 144), section 1 of which provides as follows:

"AN ACT to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico concluded on the fourth day of July, eighteen hundred and sixty-eight.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of State be, and he is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims, concluded July fourth, eighteen hundred sixty-eight, and April twenty-ninth, eighteen hundred and seventy-six, and whenever and as often as any installments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among the corporations, companies, or private individuals respectively in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the

whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. And making such distribution and payment due regard shall be had to the value at the time of such distribution of the respective currencies in which the said awards are made payable; and the proportionate amount of any award of which by its terms the United States is entitled to retain a part shall be deducted from the payment to be made on such award, and shall be paid into the Treasury of the United States as a part of the unappropriated money in the Treasury.

"And by section 5 it was also provided:

"SEC. 5. And whereas the Government of Mexico has called the attention of the Government of the United States to the claims hereinafter named with a view to a rehearing, therefore be it enacted that the President of the United be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct. And in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them.

"Approved, June 18, 1878.

"Under authority of the last recited section the then President (Mr. Hayes) caused an investigation to be made of the charges of fraud presented by the Mexican Government against these two claims, and an elaborate report was made April 15, 1880, by Mr. Evarts, the then Secretary of State, which was communicated to the Senate, and which stated that grave doubts of the substantial integrity of those claims existed, and that the honor of the United States required the two cases should be further investigated by the United States.

"The action of the President was communicated to Congress on the 15th of April, 1880, and up to this time ten installments of the amounts severally awarded have been paid by Mexico to the United States, five of which have been distributed to the claimants, the last distributory payment having been made in the case of La Abra Company, November 25, 1881, and in the case of Weil, March 8, 1881.

"On April 27, 1880, a bill (S. 1682), was introduced in the Senate directing the United States Court of Claims to investigate the claims of Benjamin Weil and La Abra Silver Mining Company, and was referred to the Committee on the Judiciary.

"Upon this bill an adverse report, No. 172, Forty-sixth Congress, second session, was made by the Judiciary Committee, on June 10, 1880, recommending its indefinite postponement, which was duly ordered by the Senate. (Senate Journal, June 10, 1880, p. 703.)

"The substance of this report is that the result of an arbitration authorized by an international convention should not be defeated or controlled by the separate action of one of the two Governments, but that the proper remedy was in a new convention in which provision should be made for doing justice to all claimants.

"On July 13, 1882, a new treaty was concluded between the Secretary of State,, Mr. Frelinghuysen, and the Mexican envoy, Mr. Romero, and submitted to the United States Senate, which provided for a rehearing on each of the cases referred to, to control all installments not paid by Mexico before January 31, 1882, and the balance of said claims remaining undistributed at that time.

"This treaty, which had been pending in the Senate ever since July 20, 1882, was on the 21st of April, 1886, rejected by the Senate, as appears by their communication.

"It seems proper here to observe that by the voluntary negotiation of this second treaty Mexico submitted the question (whether these claims should be readjudged or no) to the treaty-making power of the United States, of which it was well known that two-thirds of the Senate was an essential part, and that the relief sought from the effects of the former treaty could only be secured by obtaining such a constitutional majority in its favor.

"Suits had been instituted in the supreme court of the District of Columbia, by individuals interested in the claims in question, to obtain writs of mandamus requiring the Secretary of State to pay to the several relators their proportions of the installments of 1882.

"These cases came up on appeal before the Supreme Court of the United States, and at October term, 1883, the history of both of these claims was fully recited by the court in delivering their opinion; at the close of which the following language was employed by the Chief Justice:

"Under these circumstances it is, in our opinion, clearly within the discretion of the President to withhold all further payments to the relators *until the diplomatic negotiations between the two Governments on the subject are finally concluded.* * * *

"All we decide is that it was within the discretion of the President to negotiate again with Mexico in respect to the claims, and that *as long as the two Governments are treating on the questions involved,* he may properly withhold from the relators their distributive shares of the moneys now in the hands of the Secretary of State.

"There can be no doubt that the power to institute new negotiations between the two countries rests in the discretion of the Executive; yet that discretion must be instructed by the history of the proceedings to which I have alluded; and in the light of the investigation and report made by your predecessors in office, and the ample knowledge of the facts long since and fully laid before both houses of Congress, and especially the Senate, whose action upon a proposed law, and subsequently upon a treaty, I have herein fully related, I am not informed that you would consider it would be proper or expedient under the cir-

cumstances again to submit through the forms of a treaty further propositions for a rehearing in the two cases, in view of the late action of the Senate of the United States, whose adverse judgment with full information of the facts has been constitutionally declared.

"Nothing more is known or remains to be communicated to Congress than has already been laid before it in connection with these two claims. Since the negotiation of the treaty of 1882 no new facts have been adduced on either side.

"I therefore respectfully suggest that you notify Congress of the condition of the law and facts. The United States have advocated, and themselves adopted, in cases of the gravest importance, the principle of voluntary and amicable arbitration for the settlement of questions and claims of an international character, and it is obvious that this dignified and desirable mode of adjustment can best be maintained by its production of results satisfactory to the honorable sense of justice and equity of both of the high contracting parties.

"It is within the province of the legislative branch of this Government now to review the history of the proceedings—legislative, executive, and judicial—connected with the two claims.

"The act of Congress of June 18, 1878, contains a request that the President should investigate any charges of fraud presented by the Mexican Government against the claims in question, and that if he should be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity should require that these awards, or either of them, should be reopened and the cases retried, it should be lawful for him to withhold payment of said awards, or either of them, until such case or cases should be retried and decided *in such manner as the Governments of the United States and Mexico may agree.* The retrial of these cases was, therefore, to be subject to such international arrangement as might be agreed upon between the Governments of the United States and Mexico. On April 16, 1880, in response to a resolution of the Senate, the President (Mr. Hayes) communicated to the Senate the result of the investigation made by the Executive under the direction or request of the act of June 18, 1878, as appears by Executive Document No. 150, Forty-sixth Congress, second session.

"This last-mentioned act of Congress contained the further provision—stated not additionally, but in the alternative to those above recited—'*or* until Congress shall otherwise direct.'

"To relieve the action of our Government from any ambiguity of legislative expression, or the Executive from any uncertainty as to his line of duty in relation to the awards in favor of Benjamin Weil and La Abra Silver Mining Company under the treaty with Mexico promulgated February, 1879, I suggest that the attention of Congress should be earnestly invoked to the consideration of the present status of these claims referred to, and the duty of the Executive under an existing

treaty, to which the force and effect of paramount law is given by the Constitution in the event of the adjournment of the two houses without further action in reference thereto."

Report of Mr. Bayard, Sec. of State, to the President, May 6, 1886, sent by the President to Congress May 11, 1886. Senate Ex. Doc. 140, 49th Cong., 1st sess. See further, App., vol. iii, § 221.

The Senate, in executive session, on April 20, 1886, declined to consent to the ratification of the treaty opening the awards. A bill was then introduced to refer the question of both awards to the Court of Claims. The disposal of this measure awaits the action of the present Congress. (October, 1886.)

The question is elaborately examined in a report by Mr. Morgan, from the Senate Committee on Foreign Relations, June 11, 1886. (Senate Rep. 1316, 49th Cong., 1st sess.)

The following documents may be referred to in this relation:

Report relative to the claims of La Abra Silver Mining Company and Benjamin Weil. House Rep. 27, 45th Cong., 2d sess.

Claims on Mexico of James B. L. Primm, H. S. Bell, and H. E. Woodhouse. Report remitting them to the Executive. House Rep. 115, 45th Cong., 3rd sess.

Cases of Benjamin Weil and La Abra Silver Mining Company. Report favoring their reference to the Court of Claims. House Rep. 1702, 46th Cong., 2d sess.

Report adverse to the bill sending them to the Court of Claims for investigation. Senate Rep. 712, 46th Cong., 2d sess.

Payments made on the Weil and La Abra claims. President Arthur's message of February 25, 1884, transmitting report of the Secretary of State. House Ex. Doc. 103, 48th Cong., 1st sess.)

By the claims convention of July 4, 1868, between the United States and Mexico, it was agreed that "all claims on the part of corporations, companies, or private individuals, citizens of the United States upon the Government of the Mexican Republic, arising from injuries to their persons or property by authorities of the Mexican Republic," should be submitted to the decision of a commission to be created under the treaty; that it should "be competent for each Government to name one person to attend the commission as agent on its behalf, to present and support claims on its behalf," and that the parties would "consider the result of the proceedings of this commission as a full, perfect, and final settlement." It was ruled by the Supreme Court that though the awards made by the commission under this authority are on their face final and conclusive, as between the United States and Mexico, they are only so until set aside by agreement between the two Governments or otherwise; and that the United States may treat with Mexico for a retrial of any case decided by the commission, and that the President may withhold from any claimant his distributive share of any sums paid by Mexico under the treaty, while negotiating with that Republic for a retrial of his case.

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

When it is alleged that a decision in an international tribunal against a foreign Government was obtained by the use of fraud, no technical rules of pleading as applied in municipal courts should be allowed to stand in the way of the national power to do what is right. It was further held in regard to section one, of the act of June 18, 1878 (ch. 262, 20 Stat. L., 144,) which authorized and required the Secretary of State to receive all sums paid by Mexico in pursuance of its claims convention with Mexico, of 1868, and to distribute them in ratable proportions among those in whose favor awards had been made, that this only provided for the receipt and distribution of the sums paid without such a protest or reservation on the part of Mexico as in the opinion of the President was entitled to further consideration, and that it did not set new limits on Executive power. It was also agreed that section five, of the act of 1878, above noticed, requested the President to investigate charges of fraud made by Mexico respecting the proof of certain claims before the commission, and pointed out some subsequent Executive acts that might be done in the premises. But it was held that this was only an expression of the desire of Congress to have the charges investigated, and did not limit or increase the Executive powers in that respect under pre-existing laws.

Ibid. See *infra*, § 238.

"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 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. Every citizen who asks the intervention of his own

Government against another for the redress of his personal grievances must necessarily subject himself and his claim to these requirements of international comity. None of the cases cited by counsel are in opposition to this, they all relate to the disposition to be made of the proceeds of international awards after they have passed beyond the reach of the Government and into the hands of private parties. The language of the opinions must be construed in connection with this fact. The opinion of the Attorney-General in Gibbes's case, 13 Op., 19, related to the authority of the executive officers to submit the claim of Gibbes to the second commission after it had been passed on by the first, without any new treaty between the Governments to that effect, not to the power to make such a treaty."

Waite, C. J., in opinion in Frelinghuysen *v.* Key, *ut supra*. See also in this case pamphlet by Mr. G. T. Curtis, "International Arbitrations and Awards," and pamphlet by Mr. J. W. Foster in reply on "International Awards and National Honor."

Should the Government of the United States, either by its neglect in pressing a claim against a foreign Government or by extinguishing it as an equivalent for concessions from such Government, impair the claimant's rights, it is bound to duly compensate such claimant.

See *infra*, § 248.

As to the right of the Government to extinguish a debt due to one of its citizens by a foreign sovereign, see *infra*, § 248.

An act of Congress authorizing the judges of the superior courts established at Pensacola and Saint Augustine to adjust the claims provided for by the treaty of 1821, for the cession of Florida, does not make the decision of those courts final. They are subject to review and reversal by the Secretary of the Treasury.

3 Op., 677, Legaré, 1841; 4 *ibid.*, 286, Nelson, 1843; 6 *ibid.*, 533, Cushing, 1854. See *infra*, § 161.

Although it may have been a rule of an Executive Department to construe an act of Congress relating to claims in a particular manner, yet when Congress has afterward expressed an opinion in conflict with that of the Department, such action of Congress has been considered as in the nature of a legislative interpretation, which becoming courtesy to the legislative department requires the Executive to observe.

5 Op., 83, Johnson, 1849.

The Secretary of State must use his discretion in deciding whether to press the claim of a citizen of the United States against a foreign Government.

9 Op., 338, Black, 1859.

In Gibbes's case, an award, under the treaty with New Granada of 1857, was made in his favor by an international commission, but, under a new treaty, was set aside by the new arbitrators. The first award,

however, not having been vacated or set aside during the continuance of the commission, was held to be conclusive. Mr. Hoar, Attorney-General, said:

"I cannot assent to the view that this Government could affect his (the claimant's) rights under the convention, by submitting his case to the second board, or that the board was able to divest those rights by any action upon the claim, under the submission of our Government, against his will and without his consent."

13 Op., 19. See, for fuller statement, *infra*, § 221.

The Halifax fishery award of $5,000,000 against the United States, though open to grave objections, was held by Mr. Evarts, Secretary of State, not subject to revision except by consent of the British Government, which consent was refused. See *supra*, § 316.

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. L., 595; 16 Stat. L., 633). Two of the awards under the Chinese claims treaty of 1858, were reopened in behalf of rejected claimants (15 Stat. L., 440; 20 Stat. L., 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. 1376, 40th Cong., 1st sess.)

The award of an international commission does not finally settle the equitable rights of third persons to the money awarded, yet it makes a legal title to the person recognized by the award as the owner of the claim; and if he also has equal equity, his title cannot be disturbed.

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

The principle is 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."

Waite, C. J., Frelinghuysen *v.* Key, 110 U. S., 63.

United States *v.* Throckmorton, 98 U. S., 61, was a bill of chancery on the part of the United States to set aside a patent for lands, or the final confirmation of a Mexican grant. It was held that to sustain such suit it should appear that the Attorney-General had authorized it. It was further held that the frauds for which a bill to set aside a judgment or a decree, between the same parties, by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit. The cases where such relief has been granted are those in which, by fraud or deception practiced upon the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit. This, however, does not apply to cases of opening by the consent of the two litigant sovereigns.

The opinion of Mr. Binney, that it is not within the power of the Government to "confiscate" a debt from a foreign Government without compensation is given *infra*, § 248—Meade's case.

The settled rule, however, now is that the Government of the United States has absolute control of all claims by its citizens against foreign Governments; becoming, as a matter of public duty, liable to citizens holding such claims for losses they may have suffered through its failure to show due diligence in pressing their interests.

(4) ARBITRATION PROPER WHEN GOVERNMENTS DISAGREE; LIMITS OF ARBITRATION.

§ 221.

Arbitration as a mode of settling international contentions is discussed in a future section.

Infra, § 316.

When two Governments disagree as to the validity of a claim made by one upon the other, or as to the amount of damages to be awarded on such claim, then the appropriate remedy is arbitration by a mixed commission or by an umpire. When there are reciprocal claims and set-offs then all the international claims pending between the countries may be referred to a commission.

"The doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and they must necessarily decide upon a case's being within or without their competency."

Lord Loughborough, as quoted by Mr. King's No. 26, Feb. 20, 1797, MSS. Dispatches, Gr. Brit., as given in Mr. Bancroft Davis' Notes to Treaties, 93. This view was adopted by Lord Grenville, then minister for foreign affairs. See 2 Am. St. Pap., (For. Rel.,) 398. And see the Dawson and the Lord Nelson, Senate Ex. Doc. 103, 34th Cong., 1st sess.

That decisions of prize courts are not final, see *infra*, § 329*a*. And see also § 238.

As to treaty provisions, see *supra*, § 150*a*.

As to effect of disagreement of arbitrators, see Lord Grenville's letter of Apr. 19, 1806. 2 Am. St. Pap., (For. Rel.,) 398; *supra*, § 150*b*.

As to arbitration in case of brig General Armstrong, see *infra*, §§ 227, 248, 399, 401.

As to setting aside the Netherlands arbitration, see *infra*, § 316.

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, 1860. MSS. Notes, Gr. Brit.

"You will then be expected to advert to the subject of the mutual claims of citizens and subjects of the two countries against the Government of each other, respectively. The difficulty in this respect has arisen out of our claims, which are known and described in general terms as the Alabama claims. In the first place, Her Majesty's Government not only denied all national obligation to indemnify citizens of the United States for these claims, but even refused to entertain them for discussion. Subsequently Her Majesty's Government upon reconsideration proposed to entertain them for the purpose of referring them to arbitration, but insisted upon making them the subject of special reference, excluding from the arbitrators' consideration certain grounds which the United States deem material to a just and fair determination

of the merits of the claims. The United States declined this special exception and exclusion, and thus the proposed arbitration has failed. It seems to the President that an adjustment might now be reached without formally renewing former discussions."

Mr. Seward, Sec. of State, to Mr. Moran, July 17, 1868. MSS. Inst., Gr Brit.

After the outbreak of the Cuban insurrection of 1868 the Spanish Government issued decrees embargoing the property of certain citizens of the United States, and prohibiting the alienation of such property. The Government of the United States complained of this and other oppressive actions as violating the 7th article of the treaty of 1795. The result was the reference of the questions involved to a mixed commission.

Senate Ex. Doc. 108, 41st Cong., 2d sess., 243.

"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, Acting Sec. of State, to Mr. Allen, Aug. 13, 1869. MSS. Dom. Let. As to rules in such cases, see *infra*, § 316.

"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 power."

Mr. Frelinghuysen, Sec. of State, to Mr. Rosecrans, Oct. 17, 1883. MSS. Dom. Let.

"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., 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. MSS. Inst., France.

"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, Acting Sec. of State, to Mr. Curry, Jan. 2, 1886. MSS. Inst., Spain.
As to *res adjudicata* in such cases, see *infra*, § 238.

"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 can 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 cannot 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 half way in an earn-

est 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, Jan. 26, 1886. MSS. Inst., Mex.

"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 under 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. MSS. Dom. Let.

"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 fell 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 denunciation 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 Government.'

"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 the claim to the arbitrator, and this request the Secretary of State denied."

Mr. Bayard, Sec. of State, to Mr. Rodriguez, Mar. 31, 1886. MSS. Dom. Let. *Infra*, § 238. See App., vol. iii, § 221.

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., 212.

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 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.

The same rule applies to the treaty with France of the 4th of July, 1831.

Frevall *v.* Bache, 14 Pet., 95. See *infra*, § 316.

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.

Ibid. Supra, §§ 148 *ff.*

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 cannot be disturbed.

Judson *v.* Corcoran, 17 How., 612. *Supra*, § 154.

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 referance (the claim not having been yet paid) impairs no right, and is valid.

Gordon *v.* U. S., 7 Wall., 188. As to *res adjudicata*, see *infra*, § 238.

Where a special mode is provided for obtaining compensation, such as by statute or by treaty, or where the power of assessing or deciding on the questions is given to a special tribunal, the remedies specially provided can alone be pursued, and no action in the premises can be maintained in the Court of Claims.

Meade's case, 2 C. Cls., 228; affirmed, 9 Wall., 691.

An award was made under the 7th article of the treaty of 1794 with Great Britian 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.

1 Op., 153, Breckenridge, 1805.

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, 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.

2 Op., 28, Wirt, 1826. See *supra*, § 150*d*.

By the fifth article of the convention of 1818, certain differences were referred to the Emperor of Russia, who awarded that the United States were "entitled to claim from Great Britain a just indemnification for all private property which the British forces may have carried away; and, as the question relates to slaves more especially, for all the slaves that the British forces may have carried away from places and territories of which the treaty stipulates the restitution, in quitting these same places and territories." A convention was subsequently formed at St. Petersburg between the United States and Great Britain, July 12, 1822, "for the purpose of carrying into effect this award of His Imperial Majesty." A question arose as to the payment of interest on the indemnity awarded, and Great Britain appealed to the terms of the convention of 1822 as relieving her from such payment. It was held that "just indemnification" involved not merely the return of the value of the specific property, but compensation in the nature of damages for the wrongful detention of it; but since this, if not impracticable, would be a work of great labor and time, interest, according to the usage of nations, was a necessary part of the indemnification. It was further held that in case of conflict between the award and the terms of the convention of 1822, the latter should give way to the former.

2 Op., 28, Wirt, 1826. *Supra*, § 150*d*. As to interest, see *infra*, § 246.

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.

7 Op., 582, Cushing, 1855. See *infra*, § 316.

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.

11 Op., 402, Speed, 1865.

A claim was duly referred to the board of commissioners existing under the convention of September 10, 1857, between the United States and New Granada, and, agreeably to certain provisions of said convention, was afterwards submitted to an umpire, who reported his award during the existence of the board. The case was afterwards referred, without the claimant's consent, to the commission constituted under the convention of February 10, 1864, with the United States of Colombia, as the representative of the late Republic of New Granada for the examination and adjustment of such claims as were presented to, but not settled by, the previous board. It was held that the umpire's award was a valid and conclusive ascertainment of the claim under the treaty of 1857, and that the United States should ask its payment from Colombia.

13 Op., 19, Hoar, 1869. See *supra*, §§ 145, 220.

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.

13 Op., 416, Akerman, 1871. See *supra*, § 161.

As to barring claims by intermediate arbitration, settlement, or war, see *infra*, §§ 238, 240.

The following documents may be referred to in this connection:

Report in favor of establishing a court for settlement of claims against the United States. House Rep. 812, 45th Cong., 2d sess.

Report in favor of providing a judicial tribunal for foreign claims. House Rep. 198, 46th Cong., 2d sess. Favorable report that they be taken from Congress and submitted to the Court of Claims. House Rep. 69, 47th Cong. 1st sess.

As has been seen in a prior section (§ 220) the Government of the United States is not precluded by the award of an arbitration from refusing to press a claim which such arbitration approves.

The award in 1873 of the British, Italian, and United States commissioners on the claims of British subjects against the United States and United States citizens against Great Britain, will be found in Brit. and For. St. Pap. for 1873–'74, vol. 65.

(5) GOVERNMENT MAY RESORT TO EXTREME MEASURES TO ENFORCE PAYMENT.

§ 222.

As to retorsion and reprisal, see *infra*, § 318.
As to non-intercourse, § 319.
As to embargo, § 320.
As to display of force, § 321.

"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 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.
The proceedings of President Jackson, criticised above, in pressing the payment of the French indemnity in 1835–'36, are detailed *infra*, §§ 316 *ff.*
The action of the British, French, and Spanish Governments in enforcing their claims on Mexico is noticed *supra*, § 58; *infra*, § 232.

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 desire to do justice to a citizen of the United States, and to cultivate and promote the friendly relations which so happily exist between the two Governments."

Mr. Calhoun, Sec. of State, to Mr. Brent, Mar. 3, 1845. MSS. Inst., Arg. Rep. See *ibid.* for letter from Mr. Clayton, Sec. of State, to Mr. Harris, Feb. 13, 1850.
As to payment in Halsey's case, see Mr. Marcy to Mr. Peden, July 3, 1854; *ibid.*
As to arbitration, see *supra*, § 221. As to contractual claims, see *infra*, §§ 231 *ff.*

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. MSS. Inst., China. See *infra*, § 318, as to retorsion and reprisals.

As to the withdrawal of diplomatic intercourse, see *infra*, § 317.

The degree of indemnity and of satisfaction to be afforded to the Government of the United States for injuries to citizens of the United States by misconduct of the Government of Japan, must be in some measure left to the action of the minister at Japan.

Mr. Seward, Sec. of State, to Mr. Pruyn, July 10, 1863. MSS. Inst., Japan.

In such cases, 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, 1865; *ibid.*

"The rule of the law of nations is that the Government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties, or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor."

Mr. Fish, Sec. of State, to Mr. Foster, Aug. 15, 1873; citing Calvo Int. Law, vol. ii, p. 397. MSS. Inst., Mex.

As to pacific measures to obtain redress, see *infra*, §§ 315 *ff.*

As to war measures, see *infra*, §§ 333 *ff.*

IV. *CLAIMS BASED ON WAR.*

(1) A SOVEREIGN IS NOT ORDINARILY RESPONSIBLE TO ALIEN RESIDENTS FOR INJURIES THEY RECEIVE ON HIS TERRITORY FROM BELLIGERENT ACTION, OR FROM INSURGENTS WHOM HE COULD NOT CONTROL, OR WHOM THE CLAIMANT GOVERNMENT HAD RECOGNIZED AS BELLIGERENTS.

§ 223.

The mere "revolutionary state" of a part of Mexico cannot be accepted by the United States as a defense to a claim on Mexico for injuries inflicted on citizens of the United States in Mexico in violation of treaty engagements.

Mr. McLane, Sec. of State, to Mr. Butler, June 20, 1834. MSS. Inst., Mex.

A citizen of the United States who became domiciled in Nicaragua in 1856, when the country was in a state of war, and there engaged in

manufactures in the seat of tumult, and was attacked by a party of soldiers, his person injured, and his property plundered, was held not entitled to recover from Nicaragua for the injury. "When he domiciled himself in Nicaragua he knew that the Republic was in a state of war, and assumed, therefore, the necessary hazards which attend the residence even of a neutral in a belligerent country. In estimating these hazards he probably weighed against them the profits which he hoped to derive from his business, and if he has been disappointed in his expectations this Government can only lament that it is unable to afford him any remedy."

Mr. Cass, Sec. of State, to Mr. Green, Apr. 26, 1858. MSS. Dom. Let.

Whether a nation is responsible for spoliations by insurgent authorities which for a time obtain possession of part of its territory depends upon the question how far such authorities were, in international law, capable of binding the nation by their acts.

Mr. Seward, Sec. of State, Report Mar. 30, 1861. MSS. Report Book, Dep. of State.

The Government of the United States cannot be responsible to the Government of France for sentences imposed on French citizens by military tribunals in New Orleans in 1862.

Mr. Seward, Sec. of State, to Mr. Treilhard, Oct. 11, 1862. MSS. Notes, France.

And this is *a fortiori* the case when such persons were engaged actively or passively in the insurrection.

Same to same, Nov. 3, 1862; *ibid.*

Nor can such persons claim for damages sustained by them from the forcible manumission of their slaves by Federal troops.

Mr. Seward, Sec. of State, to Mr. Mercier, Nov. 8, 1862; *ibid.* See Mr. Seward to Mr. Mercier, Feb. 24, 1863, *ibid.*; *infra*, § 243.

As to case of Arbuthnot and Ambrister, see *infra*, § 348*a*.

"France, by recognizing the insurgents as belligerents, may be expected to have accepted all the responsibility of that measure, and to be content to regard her subjects domiciled in belligerent territory as identified with belligerents themselves. There can be no question as to the applicability of this rule to domiciled merchants, and the reasons for its applicability to that class seem to be sufficient for it to embrace all aliens who reside in an enemy's country for the purpose of carrying on business of any kind."

Mr. Seward, Sec. of State, to Mr. Dayton, Jan. 12, 1864. MSS. Inst., France.

That recognition of insurgents as belligerents relieves the parent state, see *supra*, § 69.

"It is believed that it is a received principle of public law that the subjects of foreign powers domiciled in a country in a state of war are not entitled to greater privileges or immunities than the other inhabitants of the insurrectionary district. If, for a supposed purpose of the war,

one of the belligerents thinks proper to destroy neutral property, the other cannot legally be regarded as accountable therefor. By voluntarily remaining in a country in a state of civil war they must be held to have been willing to accept the risks as well as the advantages of that domicil. The same rule seems to be applicable to the property of neutrals, whether that of individuals or of Governments, in a belligerent country. It must be held to be liable to the fortunes of war. In this conclusion the undersigned is happy in being able to refer the Austrian Government to many precedents of comparatively recent date, one of which, a note of Prince Schwartzenberg, of the 14th April, 1850, in answer to claims put forward on behalf of British subjects, who were represented to have suffered in their persons and property in the course of an insurrection in Naples and Tuscany."

Mr. Seward, Sec. of State, to Mr. Wydenbruck, Nov. 16, 1865. MSS. Notes, Austria.

As to culpability of claimant in such cases, see *infra*, § 243.

"This Government has not as yet paid, or made any provision for paying, damages to neutrals who were arrested and detained during the late rebellion, upon information and suspicion which investigation proved insufficient to warrant a continuance of such restraint. Having learned by our own experience that errors of this sort are among the unavoidable incidents of civil war, and the legislative authority having reserved for itself the settlement of the principles upon which indemnification shall be measured and granted in cases where it shall be found justly due, this Government is not in a position to render it discreet for it peremptorily to demand vindictive damages from a friendly power now suffering the same misfortune of internal hostilities from which we have recently found deliverance."

Mr. Seward, Sec. of State, to Mr. Edwards, Feb. 27, 1869. MSS. Dom. Let.

The mere temporary arrest and detention of a citizen of the United States in France at the time of the siege of Paris, during the Franco-German war of 1871, does not, by itself, give ground for a claim against the French Government unless it be shown that the arrest was without excuse or probable cause. "Citizens of the United States, in common with other foreigners who were unfortunate enough to be residents of France during the period to which Mr. H.'s memorial refers, were rendered liable to certain inconveniences which seem to have been unavoidable under the circumstances, and are inseparable from a condition of war such as France was then in. Such a state of society as then existed in France demanded from foreigners who were at the time resident there the utmost prudence and caution. Whether Mr. H. exercised such prudence does not clearly appear from the papers which he has placed on file. His case does not seem to present any feature not common to the cases of many citizens of the United States who were

arrested in France during that period, on similar grounds and under circumstances at least as favorable as those which surrounded Mr. H."

Mr. Fish, Sec. of State, to Mr. Washburne, Oct. 19, 1872. MSS. Inst., France.

A foreign Government may be liable to aliens for damages inflicted by insurgents against its authority whom it has not recognized as belligerents, and who have not been so recognized by the Government making the demand.

Mr. Davis, Acting Sec. of State, to Mr. Pile, July 28, 1873. MSS. Inst., Venez. This, however, assumes that the insurrection was not beyond the control of the Government in whose titular territory it existed.

"If a country receives strangers within its limits, it thereby incurs a liability to protect them from violence, not only on the part of its own authorities, but ordinarily also from violence on the part of insurgents. This latter ground of liability may be regarded as continuing at least until the Government of a neutral country whose citizens may be aggrieved in the course of the hostilities, shall recognize the insurgents as entitled to belligerent rights. (*Supra*, § 69.) There was no such recognition by this Government at the time when the claimants adverted to sustained the injuries of which they complain. This, however, though the general rule, is subject to obvious exceptions. Perhaps the rule should not always apply to persons domiciled in a country, and rarely to such as may visit a region notoriously in a state of civil war, or ever to such part of a country as may virtually be dominated by savage tribes."

Mr. Fish, Sec. of State, to Mr. Foster, Aug. 15, 1873. MSS. Inst., Mex.

The treaty of 1831, between the United States and Mexico, does not by itself relieve Mexico from liability for injury inflicted by insurgents in Mexico on citizens of the United States.

Ibid.

"The passage from Lord Stanley's speech on the Pacifico case, which Calvo quotes, does not appear to give the support to the position of Mr. Lafragua which he seems to suppose. His lordship says he does not believe that Governments are obliged *to the full extent of the term* to indemnify foreigners who may have suffered damage by superior force. This Government coincides in opinion with his lordship. There are cases in which there may be no accountability on the part of the Government. The loans exacted from Mr. Ulrich and Mr. Langstroth are not, however, regarded as a case of that character. The position taken by Austria and Russia in respect to the damages sustained by British subjects from the effects of the insurrection in Tuscany in 1848, and particularly at Leghorn, to which Calvo refers, are not believed to strengthen the position of Mr. Lafragua. It is true that Calvo, in this instance, does not state the case with sufficient fullness to enable it to be easily understood. If, however, from an expression in the paper of

Count Nesselrode, which is referred to, it may be inferred that the damages were sustained in the recovery by the Tuscan Government by force of arms, of its possession of Leghorn, such a case, also, is entirely different from the exaction of the forced loans in the one under consideration."

Mr. Fish, Sec. of State, to Mr. Foster, Dec. 10, 1873. MSS. Inst., Mex.

"It is true that this Government has not confessed its liability for the injuries to foreigners by persons claiming authority in the South during the rebellion. The reason for this disavowal is believed to be as strong as that for the accountability of Mexico in the other case. Belligerent rights had tacitly, at least, been granted to the insurgents not only by this Government but by those of the principal European nations. This is a concession which may be allowed to carry with it an acknowledgment that the party in whose favor it may be made is both competent and willing to do justice to the citizens or subjects of the grantor, and, indeed, may of itself be allowed to exempt the other party from such accountability. This Department is not aware that the Mexican Government ever acknowledged the belligerent rights of the citizens in New Leon. It is believed to be certain that they were never acknowledged by any foreign Government. * * *

"It may be repeated that this Government has not acknowledged its accountability for injuries to foreigners by insurgents during the late civil war in this country. In this it is regarded as justified by the magnitude of that conflict, and especially by the fact that the foreigners who were so injured are citizens or subjects of countries who acknowledged the insurgents as belligerents."

Mr. Fish, Sec. of State, to Mr. Foster, Dec. 16, 1873. MSS. Inst., Mex.

"The resort to such measures as were adopted by the forces of the Haytian Government to suppress the local revolt against the Government and the laws may have been, and no doubt was, in the estimation of the Haytian Government, entirely justifiable, and this Government has no disposition to question the correctness of this view as to these precautionary municipal measures; but it follows, nevertheless, that the Government is answerable for the destruction of private property which may have been necessarily sacrificed to the success of such measures. It is because of the recognition by this Government of the necessities that such emergencies give rise to that it limits the demand in the present instance to compensation for actual losses."

Mr. Blaine, Sec. of State, to Mr. Langston, July 1, 1881. MSS. Inst., Hayti.

Mr. Fish's report of May 15, 1871, giving the reports of Mr. Whiting, Solicitor of the War Department, on claims by aliens for damages in the civil war is in Senate Ex. Doc. 2, 42d Cong., special sess.

Mr. Lawrence's report on war claims of aliens is found in House Rep. 262, 43d Cong., 1st sess.

"According to the laws and usages of nations, a state is not obliged to make compensation for damages done to its citizens by an enemy or wantonly or unauthorized by the troops."

Report of Mr. Hamilton, Sec. of Treas., Nov. 19, 1792; Am. St. Pap., Class IX, vol. i, of claims; adopted in report of March 26, 1874, on war claims, House Rep. 262, 43d Cong., 1st sess.

The correspondence with Great Britain as to the bombardment of the fortress of Omoa, Honduras, by the British ship of war Niobe, on Aug. 19 and 20, 1873, is given in the Brit. and For. St. Pap. for 1875, '76, vol. 67.

The United States Government is not liable for loss to Peruvian citizens caused by the destruction of their property on board a ship in Chesapeake Bay, in 1862, such destruction being effected by a sudden attack of insurgents, which could not by due diligence have been averted by the Government of the United States.

Mr. Seward, Sec. of State, to Mr. Barreda, Jan. 9, 1863. MSS. Notes, Peru.

A Government is liable internationally for injury inflicted on aliens through its negligence in permitting insurgents to destroy the property of such aliens and by its subsequent implied ratification of the conduct of such insurgents, there being no redress offered in the courts of such Government.

Mr. Frelinghuysen, Sec. of State, to Mr. Baker, Apr. 18, 1884. MSS. Inst., Venez. See Mr. Bayard, Sec. of State, to Mr. Baker, May 12, 1885; *ibid.*

"However severe may have been the claimant's injuries, it must be recollected that like injuries are committed in most cases where towns are sacked, and that aliens resident in such towns are subject to the same losses as are citizens. It has never been held, however, that aliens have for such injuries a claim on the belligerent by whom they are inflicted. On the contrary the authorities lay down the general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of the state."

Mr. Bayard, Sec. of State, to Mr. O'Connor, Oct. 29, 1885. MSS. Dom. Let.

"This Department in its instructions to our ministers at those courts which recognized the Southern insurgents as belligerents, has maintained that those nations, after such recognition, must be content to have their subjects who were domiciled as merchants in belligerent territory considered as belligerents, and the same argument would embrace all aliens residing in an enemy's country for business purposes or represented by agents there."

Mr. Bayard, Sec. of State, to Mr. de Muruaga, June 28, 1886. MSS. Notes, Spain. See App., vol. iii, § 223.

"In July, 1864, a question was raised as to the position of British subjects residing at Memphis, United States, then under martial law, and Lord Lyons was instructed to inform them that Great Britain would not interfere with the operation of that law in a foreign state, and that British subjects who wished to secure British protection must discon-

tinue their residence in places under such military control. Parl. Papers, No. 363. 1864."

1 Halleck's Int. Law (Baker's ed.), 351. That aliens must submit to martial law, see 2 *id.*, 455.

In such cases necessity is a defense. "It is not to be doubted that there are cases in which private property may be taken for a public use without the consent of the owner, and without any provision of law for making compensation. There are cases of urgent public necessity, which no law has anticipated, and which cannot await the action of the legislature. In such cases the injured individual has no redress at law. Those who seize the property are not trespassers, and there is no relief for him, but by petition to the legislature; for example, the pulling down of houses and raising bulwarks for the defense of the state against an enemy, seizing corn and other provisions for the sustenance of an army in time of war, or taking cotton bags, as General Jackson did at New Orleans, to raise ramparts against an invading foe."

Parham *v.* Justices, 9 Ga., 341. See to same effect, Taylor *v.* Plymouth, 8 Metc., 465; Russell *v.* New York, 2 Denio, 473; British Plate Co. *v.* Meredith, 4 Term. R., 796; and other cases cited Wharton on Negligence, §§ 126, 127.
As to necessity, see further, *supra*, §§ 38, 50.

That the British loyalists who suffered pecuniary loss through the casualties of war during the American Revolution had no claim on the United States, under the law of nations, for redress was admitted by Mr. Pitt, June 3, 1785, in the House of Commons. (27 Hansard's Parl. Hist., 610, 618.) The same point was determined by the British American Claims Commission. (See House Rep. 262, 43d Cong., 1st sess.) (*Infra*, § 338.)

A neutral's residence in an enemy's country exposes his property to enemy's risks. (*Infra*, § 352.)

(2) NOR FOR ACTS OF LEGITIMATE WARFARE WAGED BY HIM ON HIS ENEMY'S SOIL. § 224.

As to what warfare is "legitimate," see *infra*, §§ 347 *ff.*
As to effect of neutral's residence in belligerent country, see *infra*, § 352.

"No power assailing an enemy's country is required to discriminate between the subjects of that country and foreigners domiciled therein, nor can the latter with any better right than the former claim indemnity in any case, except from the country under whose jurisdiction they have placed themselves. * * *

"If the sovereign power of a country acquiesces in, and apparently approves of, the chastisement by a foreign power of those under its protection, it certainly will not be concluded that the sufferers by that chastisement are entitled to indemnity from that foreign power for losses thereby sustained."

Mr. Marcy, Sec. of State, to Mr. Sartiges, Feb. 26, 1857. MSS. Notes, France.

A mere transient foreign resident of a bombarded city cannot, if the bombardment were in due course of war, recover from the bombarding power damages for injuries sustained by him during the bombardment; *a fortiori* he cannot when he was domiciled in the bombarded city.

When the property of British subjects in Antwerp was destroyed in 1830 by the Dutch bombardment, it was held by the British Government, after consulting the attorney-general, that the "Dutch Government was not liable for the disasters occasioned by the bombardment." "This conclusion was adopted by all the powers whose citizens had property destroyed at Antwerp." It was held by these powers that Belgium was liable for the injuries. The same view was taken as to the injuries inflicted in the course of war on American property in Naples in 1807.

Ibid.

"The Court of Claims, adopting the language of my predecessor, Mr. Seward, has decided it to be the law and usage of nations that one who takes up a residence in a foreign place and there suffers an injury to his property by reason of belligerent acts committed against that place by another foreign nation, must abide the chances of the country in which he chooses to reside; and his only claim, if any, is against the Government of that country, in which his own sovereign will not interest himself. Such has been the doctrine and practice of the United States and of the great powers of Europe; and this Government, therefore, cannot intervene in behalf of Mr. Fongen, or of any citizen of the United States under the same circumstances."

Mr. Fish, Sec. of State, to Mr. Washburne, Apr. 28, 1871. MSS. Inst., France; For. Rel., 1871. See *infra*, § 352.

"Your letter of March 19, 1871, to the President of the United States, in reference to the spoliation of the property of your father, who appears to have been domiciled and to have owned real estate in France, by German soldiers, has been referred to this Department.

"In reply, I have to say that this Government is not in a position to dissent from the view recently announced in a similar case by the British Government in the following terms:

"'Her Majesty's Government do not consider that in strict right they would be entitled to claim compensation from the Prussian Government for the destruction of Mr. Smith's property, as it would seem that though an Englishman he has become the proprietor of a house and farm at St. Owen and has established his wife and family there, by which proceeding he has so incorporated himself into the territory of France as to render it unavoidable that his family and property should be exposed like those of native citizens of France resident in the same district, to the evils incident on a state of war.'"

Mr. Fish, Sec. of State, to Mr. Duncan, May 16, 1871. MSS. Dom. Let.

"When one power, in the exercise of its sovereign rights, deems it proper to exercise acts of hostility against the territory of another power, the citizens of foreign states, residing within the arena of war, whose property may have been injured or destroyed during the war, have no right to demand compensation, on the ground of their being

citizens of a third power, for losses which the necessities of war bring upon them in common with the citizens of the State invaded."

Mr. Fish, Sec. of State, to Mr. Niles, Oct. 30, 1871. MSS. Dom. Let.

The United States Government cannot be made liable to Italy for injuries inflicted in January, 1866, on Italians resident in Mexico, by persons claiming to be soldiers of the United States acting under request of the Mexican Republic. The remedy, if any, must be sought from Mexico.

Mr. Fish, Sec. of State, to Mr. Corti, Dec. 9, 1872. MSS. Notes, Italy.

Nor is the United States Government liable for the collateral depredations of United States soldiersat such time.

Ibid.

"I am not aware of any principle of public law by which either of the belligerents is held bound to indemnify or make reparation to the owners of property destroyed in the necessary prosecution of hostile operations.

"Nor does the fact that Mr. Ravenscroft is a subject of Great Britain in any way affect his claim to compensation; being a resident within the seat of war at the time of his alleged losses, he was equally with the citizens of the country subject to the fortunes and incidents of war. Earl Granville, with his usual clearness, applies this principle to the case of Mr. Kirby, an English gentleman, residing at La Forte, Imbault, in France, during the late Franco-German war. The German forces had appropriated much of that gentleman's property for military purposes, and he sought the interposition of his own Government, to enable him to obtain compensation or indemnity for his losses. Lord Granville replies to his application by saying that 'it is out of their (the Government's) power to interfere to obtain any redress for him, inasmuch as foreigners residing in a country which is the seat of war are equally liable with the natives of the country to have requisitions levied on their property by the belligerents.' In another case his lordship says 'that her Majesty's subjects, resident in France, whose property has been destroyed during the war, cannot expect to be compensated on the ground of their being British subjects for losses which the necessities of war have brought upon them in common with French subjects.' And in still another case, that of the English residents at Chantilly, his lordship instructs Mr. Odo Russell, in presenting their case for the consideration of the Emperor of Germany, to state 'that Her Majesty's Government make no claim for the petitioners to be exempted, as British subjects, from the evils incident to a state of war, to which all other persons, resident in France, are exposed.'

"These views are in full accord with the long-established and well understood rules which the necessities and exigencies of war give rise to. However much they may be modified in practice by the enlight-

ened and humane spirit of modern times, the rules which govern the conduct and rights of belligerents in such emergencies are not changed."

Mr. Fish, Sec. of State, to Mr. Thornton, May 16, 1873. MSS. Notes, Gr. Brit. Reaffirmed in same to same, Oct. 6, 1873. *Ibid.*

"The facts and circumstances were then carefully examined; and in replying to Mr. Duncan, on the 16th of May, 1871, I took occasion to state that this Government was not in a position to dissent from the view then recently announced by the British Government in the following terms: (See quotation, *supra*, in this section).

"The principle thus admitted by the British Government with reference to their own subjects, this Government has had occasion to apply to claims of a similar character preferred by citizens of other powers, who were domiciled in the United States during our own late war. The doctrine is one long established and universally recognized, and no good reason is perceived for departing from it in the present instance."

Mr. Fish, Sec. of State, to Mr. Gibson, Dec. 30, 1875. MSS. Dom. Lot. This position is approved in 2 Halleck Int. Law, (Baker's ed.,) 179.

"In regard to the law applicable to the bombardment of unfortified places, permit me to refer you to the opinion of Attorney-General Henry Stanbery, of the 31st of August, 1866, relative to the bombardment of Valparaiso by the Spaniards. A manuscript copy of the paper is herewith transmitted to provide for the contingency of your not having a printed one."

Mr. Evarts, Sec. of State, to Mr. Christiancy, June 18, 1879. MSS. Inst., Peru. Document in message of President, of Jan. 26, 1882.

[Inclosure in above.]

ATTORNEY-GENERAL'S OFFICE,
August 31, 1866.

SIR: It appears from your letter of the 27th [24th] instant that the American commercial houses of Wheelwright & Co. and Loring & Co., domiciled for commercial purposes at Valparaiso, sustained losses of their merchandise in the conflagration caused by the bombardment of that city by the Spanish fleet on the 31st of March last.

The question presented for my opinion is, whether a case is made for the intervention of the United States on behalf of these citizens for indemnity against Spain or Chili?

I do not see any ground upon which such intervention is allowable in respect to either of those Governments.

The bombardment was in the prosecution of an existing war between Spain and Chili. Although, under the circumstances, it was a measure of extreme severity, yet it cannot be said to have been contrary to the laws of war, nor was it unattended with the preliminary warning to non-combatants usual in such cases.

It does not appear that in carrying on the bombardment any discrimination was made against resident foreigners or their property. On the contrary, there was at least an attempt to confine the damage to public property.

Then, as to the Chilian authorities, it does not appear that they did or omitted any act for which our citizens there domiciled have a right

to complain, or that the measure of protection they were bound by public law to extend to those citizens and their property was withheld.

No defense was made against the bombardment, for that would have been fruitless, and would have aggravated the damage, as Valparaiso was not then fortified, and no discrimination was made by those authorities between their own citizens and foreigners there domiciled. All shared alike in the common disaster.

The rule of international law is well established that a foreigner who resides in the country of a belligerent can claim no indemnity for losses of property occasioned by acts of war like the one in question.

The bombardment of Copenhagen by the British in 1807 is a notable illustration of this rule. Immense losses were sustained by foreigners domiciled in that city. There was no previous declaration of war against Denmark, and no reasonable ground upon which the bombardment could be justified, and yet no reclamation upon the footing of these losses was ever admitted by Great Britain. The bombardment of Greytown, in May, 1854, by the United States sloop of war Cyane, is another instance of this rule. Losses were sustained by French citizens there domiciled, from the fire of the Cyane. A petition to the United States from those parties for indemnity was presented through the French minister, then resident at Washington, but without the express sanction of his Government. Upon full consideration this petition was refused. Mr. Marcy, then Secretary of State, in answer to the claim, holds the following language: "The undersigned is not aware that the principle that foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of war, has ever been seriously controverted or departed from in practice."

I have therefore to repeat that I am of opinion no ground is laid for the intervention of the United States in favor of these parties.

I am, &c.,

Hon. WM. H. SEWARD, *Secretary of State.* HENRY STANBERY.

For Mr. Seward's letter to Mr. Stanbery, see *infra*, § 225.

"An examination of the case of Mr. John Calvocoressi with a view to giving you the further instructions asked in your No. 88, of the 14th of April last, has been deferred through press of urgent business until now.

"Your conclusion that, as a matter of right, the presentation of the case to the Russian Government, as reported by you, is now complete, is regarded as sound. As a principle of international law, the view that a foreigner domiciled in the territory of a belligerent cannot expect exemption from the operations of a hostile force, is amply sustained by the precedents you cite, and many others. Great Britain admitted the doctrine as against her own subjects residing in France during the Franco-Prussian war; and we, too, have asserted it successfully against similar claims of foreigners residing in the Southern States during the war of secession.

"Nevertheless, considering that San Stefano was not the scene of active hostilities which would justify the apparently wanton damages done to the property of Mr. Calvocoressi, and that the lengthy occupation of his dwelling was for the discretional convenience of the Russian officers rather than from any strategic necessity or urgent military purpose, and therefore was of a nature for which compensation is,

according to the usages of war, generally allowed by military commanders, the claim is deemed a proper one to submit, as you have already done, to the sense of equity and fair dealing of the Government of His Imperial Majesty, and it is hoped that it will have received favorable consideration before this reaches you. Should the Russian chancellor, however, reply, denying responsibility, as of right, for the military occupation of Mr. Calvocoressi's dwelling, you will briefly urge the claim as one of equity. You will, however, take no action upon this instruction unless a negative reply of the Russian Government should make it opportune to act in the sense indicated."

Mr. Evarts, Sec. of State, to Mr. Hoffman, July 18, 1879. MSS. Inst., Russia; For. Rel., 1879.

"The property of alien residents, like that of natives of the country, when 'in the track of war,' is subject to war's casualties, and whatever in front of the advancing forces that either impedes or may give them aid when appropriated, or which, if left unmolested in their rear, might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents, and no liability whatever is understood to attach to the Government of the country whose flag that army bears, and whose battles it may be fighting, and when actual, positive war is in progress the commander of the armies in the field must be the judge of the existing exigencies and necessities which dictate such action. This is believed to be the universal rule at the present day; it is that which has been followed by the Governments of Europe in recent wars. In the case of the Franco-Prussian war of 1870–'71, Earl Granville, then Secretary of State for foreign affairs of Great Britain, adhered to this rule in regard to British subjects resident in France during the time of the Prussian invasion of France, and it is known that British subjects then resident in France, and who were in the track of the war, lost property to the amount of many millions of dollars.

"In the late civil war in this country, that from which Mr. Melebeck deduces his claim, that rule has been followed in the case of natives of the country who were in sympathy with the rebel cause, and aliens who had remained voluntary residents of any of the States in rebellion, during the prosecution of the war."

Mr. Frelinghuysen, Sec. of State, to Mr. Bounder de Melsbroeck, Apr. 17, 1883. MSS. Notes, Belgium.

As to claim of inhabitants of East Florida for depredations by troops of the United States in 1812, see House Report of Mr. Forsyth, March 10, 1826, House Doc. 422, 19th Cong., 1st sess.; 5 Am. St. Pap. (For. Rel.), 829.

As to Battersly's claim against the United States for seizure of his cotton at Savannah during the civil war, see adverse report, May 31, 1876, Senate Rep. 345, 44th Cong., 1st sess.

As to claim against United States for seizure of property of W. Tabb, by the military authorities during the civil war, he being an alien who had declared his intentions before the origin of the claim, see report favoring the submission to Court of Claims, House Rep. 109, 44th Cong., 2d sess., favorable report. Senate Rep. 519, 48th Cong., 1st sess.

In Resp. *v.* Sparhawk, 1 Dall., 362, it was held that a party whose property, under the direction of the Continental Congress, had been removed during the war to prevent it falling into the enemy's hands, could not obtain compensation from the commonwealth, such property having been afterwards captured by the enemy.

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; *infra*, § 353.

When the British invaded Castine, in the State of Maine, the commander of the United States ship Adams, then lying in that port, burnt his vessel to prevent her from falling into the hands of the enemy. The fire was communicated to a neighboring warehouse, in which valuable property was destroyed, for which a claim was made against the Government. It was advised that the destruction was a casualty of war resulting from exposure, and that the Government was not liable.

1 Op., 255, Wirt, 1819.

The destruction of goods by a public enemy does not release the owner from the payment of duties that have become due by law.

1 Op., 269, Wirt, 1819.

American merchants, domiciled for commercial purposes at Valparaiso, cannot sustain a claim for indemnity against Spain or Chili for losses of merchandise caused by the bombardment of Valparaiso by the Spanish fleet in March, 1866.

12 Op., 21, Stanbery, 1866, quoted *supra* in full.

(3) GREYTOWN BOMBARDMENT.

§ 224.

For attack on the Prometheus, prior to the attack on Greytown, see *infra*, § 315*d*.

In 1853, after a series of spoliations of citizens of the United States by inhabitants of San Juan (Greytown) with the connivance of the authorities of that place, and after gross indignities to a diplomatic agent of the United States then at Greytown, the property of the "Accessory Transit Company," owned largely by citizens of the United States, was attacked and plundered by the same aggressors at Punta Arenas, near Greytown. Captain Hollins, commanding the United States war ship Cyane, interfered for the protection of the company, and after due warning to the town, bombarded it, and afterwards sent on shore a corps of marines, so as to compel submission and inflict chastisement. This course was sustained by the Government of the

United States, there being proof that the place was held by "a horde of marauders," who greatly disturbed transit over the Isthmus.

Mr. Marcy, Sec. of State, to Mr. Ingersoll, June 9, 1853. MSS. Inst., Gr. Brit. Mr. Marcy to Mr. Buchanan, Aug. 8, 1854. *Ibid.* See further, *supra*, § 50*d*. As to Greytown and Mosquito coast, see further, *supra*, §§ 150 *ff*; *infra*, § 295.

"So soon as the necessity was perceived of establishing interoceanic communications across the Isthmus, a company was organized, under authority of the State of Nicaragua, but composed for the most part of citizens of the United States, for the purpose of opening such a transit way by the river San Juan and Lake Nicaragua, which soon became an eligible and much-used route in the transportation of our citizens and their property between the Atlantic and Pacific. Meanwhile, and in anticipation of the completion and importance of this transit way a number of adventurers had taken possession of the old Spanish port at the mouth of the river San Juan, in open defiance of the state or states of Central America, which, upon their becoming independent, had rightfully succeeded to the local sovereignty and jurisdiction of Spain.

"These adventurers undertook to change the name of the place from San Juan del Norte to Greytown, and, though at first pretending to act as the subjects of the fictitious sovereign of the Mosquito Indians, they subsequently repudiated the control of any power whatever, assumed to adopt a distinct political organization, and declared themselves an independent sovereign state. If, at some time a faint hope was entertained that they might become a stable and respectable community, that hope soon vanished. They proceeded to assert unfounded claims to civil jurisdiction over Punta Arenas, a position on the opposite side of the river San Juan, which was in possession, under a title wholly independent of them, of citizens of the United States interested in the Nicaragua Transit Company, and which was indispensably necessary to the prosperous operation of that route across the Isthmus. The company resisted their groundless claims; whereupon they proceeded to destroy some of its buildings and attempted violently to dispossess it.

"At a later period they organized a strong force for the purpose of demolishing the establishment at Punta Arenas, but this mischievous design was defeated by the interposition of one of our ships of war, at that time in the harbor of San Juan. Subsequently to this, in May last, a body of men from Greytown crossed over to Punta Arenas, arrogating authority to arrest, on the charge of murder, a captain of one of the steamboats of the transit company. Being well aware that the claim to exercise jurisdiction there would be resisted then, as it had been on previous occasions, they went prepared to assert it by force of arms. Our minister to Central America happened to be present on that occasion. Believing that the captain of the steamboat was innocent, for he witnessed the transaction on which the charge was founded, and believing also that the intruding party, having no jurisdiction over the place

where they proposed to make the arrest, would encounter desperate resistance if they persisted in their purpose, he interposed effectually to prevent violence and bloodshed. The American minister afterwards visited Greytown, and whilst he was there a mob, including certain of the so-called public functionaries of the place, surrounded the house in which he was, avowing that they had come to arrest him, by order of some person exercising the chief authority. While parleying with them he was wounded by a missile from the crowd. A boat dispatched from the American steamer Northern Light to release him from the perilous situation in which he was understood to be, was fired into by the town guard and compelled to return. These incidents, together with the known character of the population of Greytown, and their excited state, induced just apprehensions that the lives and property of our citizens at Punta Arenas would be in imminent danger after the departure of the steamer, with her passengers, for New York, unless a guard was left for their protection. For this purpose, and in order to insure the safety of passengers and property passing over the route, a temporary force was organized, at considerable expense to the United States, for which provision was made at the last session of Congress.

"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 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 wrong-doers and shared the plunder, but treated with rudeness and violence those who sought to recover their property.

"Such, in substance, are the facts submitted to my consideration and proved by trustworthy evidence. 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, any one 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.

"Seasonable notice was given to the people of Greytown that this Government required them to repair the injuries they had done to our citizens, and to make suitable apology for their insult of our minister, and that a ship of war would be dispatched thither to enforce compliance with these demands. But the notice passed unheeded. Thereupon a commander of the Navy, in charge of the sloop of war Cyane, was ordered to repeat the demands, and to insist upon a compliance therewith. Finding that neither the populace, nor those assuming to have authority over them, manifested any disposition to make the required reparation, or even to offer excuse for their conduct, he warned them, by a public proclamation, that if they did not give satisfaction within a time specified, he would bombard the town. By this procedure he afforded them opportunity to provide for their personal safety. To those also who desired to avoid loss of property, in the punishment about to be inflicted on the offending town, he furnished the means of removing their effects, by the boats of his own ship, and of a steamer which he procured and tendered to them for that purpose. At length, perceiving no disposition on the part of the town to comply with his requisitions, he appealed to the commander of Her Britannic Majesty's schooner Bermuda, who was seen to have intercourse, and apparently much influence with the leaders among them, to interpose, and persuade them to take some course calculated to save the necessity of resorting to the extreme measure indicated in his proclamation; but that officer, instead of acceding to the request, did nothing more than to protest against the contemplated bombardment. No steps of any sort were taken, by the people, to give the satisfaction required. 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. There is ample reason to believe that this conduct of wanton defiance, on their part, is imputable chiefly to the delusive idea that the American Government would be deterred from punishing them through fear of displeasing a formidable foreign power, which, they presumed to think, looked with complacency upon their aggressive and insulting deportment towards the United States. The Cyane at length fired upon

the town. Before much injury had been done the fire was twice suspended, in order to afford opportunity for an arrangement; but this was declined. Most of the buildings of the place, of little value generally, were, in the sequel, destroyed; but, owing to the considerate precautions taken by our naval commander, there was no destruction of life.

"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, Second Annual Message, 1854.

The people of Greytown, in 1854, formed "a marauding establishment too dangerous to be disregarded, and too guilty to pass unpunished. If the subjects or citizens of foreign states chose to become dwellers among such an assemblage, and submit their property to such a custody, they can have no just cause to complain nor good grounds for the redress of injuries resulting from the punishment inflicted upon that offending community."

Mr. Marcy, Sec. of State, to Mr. Sartiges, Feb. 26, 1857. MSS. Notes, France.

This bombardment is sustainable by international law.

Ibid.

To same effect, see Mr. Marcy, Sec. of State, to Mr. Molina, Oct. 20, 1854. MSS. Notes, Cent. Am. See also 3 Lawrence, com. sur. droit int., 130.

"It is presumed that there will be no attempt to maintain that individual members of an organized political body, in a case like this [the bombardment of Greytown], can be allowed to separate themselves from the collective community, and claim rights and immunities which do not belong to the whole association. It would be preposterous to hold that the associated body deserved the punishment inflicted upon it, and the individuals composing it are entitled to indemnity for their sufferings.

"If there were persons in Greytown when it was bombarded who did not belong to the political organization there established, and who suffered in consequence of that bombardment, they can only resort for indemnity, if entitled to it, to that community. It was to that community they committed their persons and property, and by receiving them within its jurisdiction, it assumed the obligation of protecting them. Nothing can be more clearly established than the principle that a foreigner domiciled in a country can only look to that country for the protection he is entitled to receive while within its territory; and that if he sustains injury for the want of that protection, the country of his domicile must indemnify him."

Mr. Marcy, Sec. of State, to Mr. Sartiges, Feb. 26, 1857. MSS. Notes, France.

Mr. Seward, in a letter to Mr. Sumner, dated February 26, 1868, sustains the non-liability of the United States for losses by a French resident in the bombardment of Greytown. He further states that the claimant is bound by the acquiescence of the French Government "in the refusal of the United States to grant any indemnity for the losses of French subjects on that occasion." It is added that in 1857 Lord Palmerston applied the decision in the case of Greytown as precedent for refusing compensation to British merchants whose property in a Russian port had been destroyed by a British squadron during the Crimean war;" citing Lawrence's Wheaton, 173; Dana's Wheaton, 145; and that the same position under similar circumstances was taken by Austria and Russia, citing 2 Vattel (Guillamin's ed.), 1863.

"The undersigned cannot acknowledge any substantial difference between the claim of Mr. Bescher and those of the French subjects adverted to by Mr. Marcy in his note to M. de Sartiges of the 26th of February, 1857. A minister of the United States on his return home had been assaulted and insulted, and property of citizens of the United States had been robbed at Greytown. The Cyane was sent thither to demand redress for these injuries. This redress not having been given, the town was destroyed, partly by bombardment, and the destruction was completed by a force of marines landed for that purpose.

"How much soever this Government may regret that unoffending neutrals should have suffered under these circumstances they must look

for redress, if anywhere, to the community where they chose to take up their abode, and whose conduct occasioned the measure which led to their losses."

Mr. Fish, Sec. of State, to Baron Gerolt, Apr. 15, 1870 MSS. Notes, Prussia.

"The bombardment referred to (of Greytown) is understood to have been regarded as necessary and justifiable under the circumstances, and to have, in the main, been occasioned by insults of the inhabitants of Greytown at that time to the Hon. Solon Borland, who was on his way through there when about to return home. Property of several citizens or subjects of foreign countries was destroyed at the same time, but this Department has uniformly declined to entertain any claim to indemnification therefor."

Mr. Fish, Sec. of State, to Mr. Luttrell, Apr. 28, 1876. MSS. Dom. Let.

The correspondence with regard to the attack on the United States steamer Prometheus, in November, 1851, in the harbor of San Juan (Greytown), is given in House Ex. Doc. 61, 32d Cong., 1st sess.; Senate Ex. Doc. 30, 32d Cong., 1st sess. See Senate Ex. Doc. 6, same session, and *infra*, § 315*d*.

President Pierce's message of December 19, 1853, with accompanying papers; Senate Ex. Doc. 8, 33d Cong., 1st sess. The correspondence as to the bombardment of San Juan (Greytown) is attached to message of President Pierce of July 31, 1854; Ex. Doc. 85, 33d Cong., 1st sess.

The reports of the Secretaries of State and of the Navy, with regard to the bombardment, will be found in House Ex. Doc. 126, 33d Cong., 1st sess.

President Buchanan's message of December 23, 1857, containing correspondence as to loss sustained by this bombardment, is in Senate Ex. Doc. 9, 35th Cong., 1st sess. For report in Perrin's case see Senate Rep. 464, 44th Cong., 1st sess.

In the Brit. and For. St. Pap. for 1851-'52, vol. 41, are the following:

Message of President Fillmore, December 15, 1851, as to the attack on the Prometheus.

Instructions of Mr. Graham, Secretary of the Navy, to Commodore Parker (December, 1851), saying that "whatever may have been the merits of the question between the United States and the authorities of Nicaragua, the United States acknowledge no rights in a vessel of the Government of Great Britain to exercise any police supervision over American merchant vessels in Nicaragua, or elsewhere out of British dominions," and ordering the United States war steamer Saranac "to proceed to San Juan de Nicaragua for the purpose of affording protection to American commerce against any such interference for the future."

Letter signed by American citizens at Greytown, in respect to the Prometheus. *Infra*, § 315*d*.

Letters of British naval officers as to attack on the Prometheus.

Lord Granville to Mr. Lawrence, January 10, 1852, saying that Her Majesty's Government "entirely disavows the act of violence committed by the commander of the Express," and "offering an ample apology for that which they consider an infraction of treaty engagements," adding that "it would be unworthy the Government of a great nation to hesitate about making due reparation, when the acts of their subordinate authorities had been such as not to admit of justification." See *infra*, § 315*d*.

Correspondence of North American Atlantic and Pacific Ship Canal as to port duos at Greytown.

Lord Grauville to Mr. Crampton, January 23, 1852 (two letters), as to settlement of Mosquito question.

Lord Granville to Mr. Crampton, February 20, 1852, as to Greytown.

Mr. Crampton to Lord Grauville, March 8, 1852; March 14, 1852; March 22, 1852, as to conferences with Mr. Webster, relative to Greytown and Nicaragua.

Proceedings of meeting of citizens of Greytown, February 28, 1852, asking Nicaragua for a charter.

Mr. Crampton in reference thereto, March 18, 1852.

Mr. Webster, Secretary of State, to Mr. Graham, Secretary of Navy, March 18, 1852, commenting on same proceedings.

Mr. Crampton to Lord Malmesbury, March 28, April 5, 1852, as to settlement of difficulties.

Draft of agreement between the United States, Great Britain, and Nicaragua as to Greytown and Mosquito country.

Further correspondence relative thereto.

Proposed settlement of April 30, 1852.

Further correspondence relative thereto.

Constitution of the city of Greytown of April, 1852.

Lord Malmesbury to Mr. Crampton, July 16, 1852, as to position of Greytown.

Mr. Crampton to Lord Malmesbury, July 4, 1852, as to conferences with Mr. Webster.

Letters of Mr. Walsh and Mr. Wyke relative to Costa Rica and Nicaragua.

Further correspondence as to settlement.

Refusal of Nicaragua to accept the terms of settlement proposed by Great Britain and the United States, July 19, 1852.

Modifications proposed by Nicaragua, July 29, 1852; correspondence relative thereto.

Additional correspondence respecting the bombardment and destruction of San Juan del Norte, or Greytown, by the U. S. ship Cyane, May–July, 1854, will be found in the Brit. and For. St. Pap. for 1855–'56, vol. 46, 859 *ff.*

In Mr. Marcy's instructions of June 9, 1854, to the United States commercial agent at Greytown (San Juan) it is stated that Commander Hollins has been ordered to proceed thither in a national ship. The instructions include the following:

"It is said that the pretended political and civil authority at that place is dissolved. Should this prove to be true, there will be no organized body upon whom a demand for redress can be made, or from whom a proper indemnity for injuries or insults can be received. But the individuals who have participated in the infliction of the wrongs cannot escape from the responsibilities resulting from the conduct of the late political organization at that place. * * * The injuries for which redress is required are stated to be two-fold: (1) the spoliation of the transit company; (2) an insult to Mr. Borland, United States minister to Central America.

"If done by order of the authorities of the place they must answer for it in their assumed political character. * * * If the outrage was committed by lawless individuals, without the authority or connivance of the town, then it is clearly the duty of those who exercise the civil power at San Juan to inflict upon them exemplary punishment. The neglect to bring them to justice is an implied sanction of the acts of the transgressors."

On July 12, 1854, the United States commercial agent at San Juan (Mr. Fabens) advised Commander Hollins, of the Cyane, as follows: "In accordance with instructions from the Department of State, bearing date June 3, 1854, I notified the people of San Juan del Norte that the United States Government would demand of them payment for the property feloniously taken by and with their countenance and consent from the Accessory Transit Company. I further renewed the demand already made by the said company for outrages committed upon their property in March, 1853. To this notice and demand no official reply has been given. As regards the insult offered to Mr. Borland, our minister to Central America, I have to inform you that, so far from any apology having been offered by the town or its authorities, or any steps having been taken to bring the perpetrators thereof to justice, the chief actors and instigators are now in undisputed possession of the town, its arms and ammunitions, and they, the people of the town, are thus countenancing and approving the indignity to the present moment."

On July 12, 1854, all attempts to secure redress or apology having failed, Commander Hollins announced that at nine o'clock of the morning of July 13, the town would be bombarded.

On July 12, 1854, the commander of the British schooner Bermuda protested against this act.

On July 15, 1854, Mr. Fabens, the United States commercial agent at San Juan, reported the above facts to the Secretary of State, and added that the bombardment of the town was opened according to notice.

On July 16, 1854, Commander Hollins forwarded a report of the bombardment, which ended in an "almost total destruction of the buildings, though no lives were lost."

The prior correspondence as to the origin of the claim and the conduct of the authorities of San Juan will be found in Brit. and For. St. Pap. for 1865-'67, vol. 47, 1004 *ff.*

When the Greytown bombardment was under discussion in the House of Commons on June 19, 1857, Lord Palmerston, then first minister, said: "It is undoubtedly a principle of international law that when one Government deems it right to exercise acts of hostility against the territory of another power, the subjects of third powers who may happen to be resident in the place attacked have no claim whatever upon the Government which, in the exercise of its constitutional rights, commits these acts of hostility. For instance, it was deemed necessary for us to destroy the town of Sebastopol. There may have been in that town Germans, Italians, Portuguese, and Americans. Bnt none of these parties had any ground upon which to claim from the British and French Governments compensation for losses sustained by the result of these hostilities. Those who go and settle in a foreign country must abide the chances which may befall that country, and if they have any claim, it must be upon the Government of the country in which they are; but they can have no claim whatever upon the Government which thinks right to commit acts of hostility against that state. Therefore, we were advised, and I think rightly, that British subjects at Greytown had no ground on which they could call upon the Government of this country to demand from the Government of the United States compensation for the injuries which they suffered from the attack upon that town. We may think that the attack was not justified by the cause which was assigned. But as an independent state we have

no right to judge the motives which actuated another state in vindicating wrongs which they supposed they had sustained, and there was nothing in the relations between Great Britain and Greytown which gave us a right exceptional to the general rule of international law. Government is there (in Greytown), administered by a self-elected, self-constituted municipality of Americans, English, French, Spaniards, and Germans. They are acting upon their own responsibility, and they must, and not England, be responsible for everything they do. I believe the real state of the case was that there was a dispute between two rival American transit companies, the one patronized by the self-constituted government of Greytown, the other by the Government of the United States, and that out of the rivalship and quarrels of these two companies arose the transaction to which the noble lord has adverted. There were undoubtedly communications which passed between the British and American Governments, with a view to ascertain what the intentions of the American Government were; but we found that they rested upon the rule of international law to which I have referred, and the right which the law of nations gave them to take measures which they, in their own judgment, deemed necessary. The American Government determined not to give compensation to any parties. * * * Her Majesty's Government, therefore, acting under the advice of those who are most competent to give an opinion upon the subject, and deeming the advice in accordance with international practice, have foregone demanding any compensation of the United States for subjects of Great Britain injured by the bombardment of Greytown."

"On a subsequent occasion Mr. Adams inquired 'whether it was the intention of Her Majesty's Government to introduce any measure enabling them to grant compensation to British merchants whose property at Uleaborg, in the Gulf of Bothnia, had been destroyed on the 2d of June, 1854, by the boats of a squadron under the command of Admiral Plumridge.'

"Lord Palmerston said 'that the proceedings in this matter must be regulated by the principle which he had declared to be an international principle when a question arose as to the losses sustained by British subjects at Greytown. He then stated the principle of international law to be that persons who were domiciled in a foreign country must abide by the fate of that country in peace and war, and that, therefore, no demand could properly be made upon the American Government for losses sustained by British subjects in Greytown in consequence of hostilities between that place and the United States. The same principle applied to the case to which the honorable gentlemen now referred. There were certain British subjects, and probably the subjects of other states, who were domiciled or had property in the Russian territory. Those persons must take the chance of the protection of the Russian Empire, and if by any circumstances the place where their property was situated became the scene of hostile operations, no claim could possibly be set up by those persons, whatever country they might belong to, against the Government whose forces carried on the hostilities by which they had been made to suffer.' (Hansard's Parl. Debates, 3d series, vol. cxlvi, p. 1045, House of Commons, July 17, 1857.)"

Lawrence's Wheaton (ed. 1863), 175.

(4) BUT BELLIGERENT IS LIABLE FOR INJURIES INFLICTED IN VIOLATION OF RULES OF CIVILIZED WARFARE.

§ 225.

As to what constitutes such violation, see *infra*, §§ 347 *ff.*

"The general principle of public law, sanctioned by the express assent of the principal nations of Europe, and which this Government has asserted on many occasions, from the bombardment of Greytown down to its latest operations in the suppression of the recent rebellion, is that the citizens of foreign states who reside within the arena of war, have no right to demand compensation from either of the belligerents for the losses or injuries they sustain.

"This rule has doubtless some limitation. It is not to be construed as proclaiming immunity to a belligerent for every outrage which may be perpetrated by those in his service, simply because they occurred during the time and upon the theater in which hostilities were prosecuted. The injury, it may be conceded, must result from such military or naval measures as by the code of civilized warfare and the modern practice of nations are recognized as legitimate. There appears to be nothing in the circumstances of the bombardment of Valparaiso, so far as is known to us, which should take it out of this category. It was an act of what may be deemed extreme severity. With the question how far it was justifiable, as between the belligerents, we can have nothing to do. The most that a neutral power can ask in behalf of its citizens or other non-combatants who may be exposed to injury from an operation which, like the bombardment of a town, when once begun, must necessarily be indiscriminating in its effects, is to require that a reasonable time should be granted to them to withdraw their persons and property from the peril. The granting of even this can hardly be a matter of obligation if it would defeat or endanger the main object of the attack.

"In the case in question, as it seems to me, from such information as we have, not only was reasonable notice given by the Spanish admiral to foreign residents and non-combatants to withdraw their persons and property from exposure, but pains appear to have been taken to confine the fire of his fleet to the Government buildings and public property of Chili.

"I am induced to think, therefore, that Americans domiciled in Valparaiso have no ground for invoking the intervention of the Government to require of either Spain or Chili indemnity for their damages incurred in the bombardment of Valparaiso."

Mr. Seward, Sec. of State, to Mr. Stanbery, Aug. 24, 1866. MSS. Dom. Let. For Mr. Stanbery's opinion in reply, see *supra*, § 224.

Citizens of the United States have a right to engage in the military service of foreign powers, Christian or non-Christian, and in such cases, while the Government of the United States will not take cognizance of

their death in battle, it "will expect that no unusual or inhuman punishment be inflicted upon any of its citizens who are taken prisoners, but that they shall be treated according to the accepted rules of civilized warfare."

Mr. Fish, Sec. of State, to Mr. Williams, July 29, 1874. MSS. Inst., China. See as to enlistment in foreign service, *infra*, § 392.

"In your No. 34, of the 19th of September last, you inform this Department that the court of arbitration in Chili has lately published three rules for the decision of claims against the Government, which are as follows:

"(1) Bombardment is permissible as long as there is resistance of a rifle.

"(2) Acts committed by soldiers or persons connected with the army without orders from their superiors in command do not compromise a Government.

"(3) Any proofs taken without notice to Government affected are not admissible as evidence.

"The first rule is susceptible of various interpretations, according to the circumstances to which it is sought to be applied, and altogether too vague in its terms to admit of discussion.

"As to the second rule, the position of this Government is, that while a Government is responsible for the misconduct of its soldiers when in the field, or when acting either actually or constructively under its authority, even though such misconduct had been forbidden by it, it is not responsible for collateral misconduct of individual soldiers dictated by private malice. But the mere fact that soldiers, duly enlisted and uniformed as such, commit acts 'without orders from their superiors in command,' does not relieve their Government from liability for such acts."

Mr. Bayard, Sec. of State, to Mr. Buck, Oct. 27, 1885. MSS. Inst., Peru; For. Rel., 1885. See *infra*, §§ 347 *ff.*

The following passages are cited with approval by Mr. Bayard, Secretary of State, in instructions of May 27, 1886, to Mr. Hall (*MSS. Inst., Cent. Am.*):

"We do not at the present day often hear, when a town is carried by assault, that the garrison is put to the sword in cold blood, on the plea that they have no right to quarter. Such things are no longer approved or countenanced by civilized nations. But we sometimes hear of a captured town being sacked, and the houses of the inhabitants being plundered on the plea that it was impossible for the general to restrain his soldiery in the confusion and excitement of storming the place; and under that softer name of plunder it has sometimes been attempted to veil 'all crimes which man in his worst excesses can commit; horrors so atrocious that their very atrocity preserves them from our full execration, because it makes it impossible to describe them.' It is true that soldiers sometimes commit excesses which their officers cannot prevent, but in general a commanding officer is responsible for the acts of those under his orders. Unless he can control his soldiers, he is not fit to command them. The most atrocious crimes in war, however, are usually committed by militia and volunteers sud-

denly raised from the population of great cities and sent into the field before the general has time or opportunity to reduce them to order or discipline. In such cases the responsibility of their crimes rests upon the State which employs them rather than upon the general who is perhaps unwillingly obliged to use them."

Halleck's International Law and Laws of War (San Francisco, 1861, § 22, p. 442), citing Kent's Commentaries, Vattel's Droit de gens, and other authorities. See *infra*, § 349.

"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;" and that "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."

Dr. Francis Lieber's Instructions for the Government of Armies of the United States in the Field, sec. 1, par. 22.

As to limitations by laws of war, see *infra*, §§ 347 *ff.*

V. *CLAIMS BASED ON MOB INJURIES.*

A GOVERNMENT IS LIABLE INTERNATIONALLY FOR SUCH INJURIES WHEN IT COULD HAVE PREVENTED THEM; BUT WHEN THERE IS A REMEDY GIVEN IN THE JUDICIAL TRIBUNALS, THIS MUST BE PURSUED.

§ 226.

"The assembling of mobs happens in all countries; popular violences occasionally break out everywhere, setting law at defiance, trampling on the rights of citizens and private men, and sometimes on those of public officers, and the agents of foreign Governments, especially entitled to protection. In these cases public faith and national honor require, not only that such outrages should be disavowed, but also that the perpetrators of them should be punished wherever it is possible to bring them to justice; and, further, that full satisfaction should be made in cases in which a duty to that effect rests with the Government, according to the general principles of law, public faith, and the obligation of treaties. Mr. Calderon thinks that the enormity of this act of popular violence is heightened by its insult to the flag of Spain. The Government of the United States would earnestly deprecate any indignity offered in this country in time of peace to the flag of a nation so ancient, so respectable, so renowned as Spain.

"It appears, however, that in point of fact no flag was actually flying or publicly exhibited when the outrage took place; but this can make no difference in regard to the real nature of the offense or its enormity. The persons composing the mob knew that they were offering insult and injury to an officer of Her Catholic Majesty, residing in the United States under the sanction of laws and treaties; and there-

fore their conduct admits of no justification. Nevertheless, Mr. Calderon and his Government are aware that recent intelligence had then been received from Havana, not a little calculated to excite popular feeling in a great city, and to lead to popular excesses. If this be no justification, as it certainly is none, it may still be taken into view, and regarded as showing that the outrage, however flagrant, was committed in the heat of blood, and not in pursuance of any predetermined plan or purpose of injury or insult. * * *

"While this Government has manifested a willingness and determination to perform every duty which one friendly nation has a right to expect from another, in cases of this kind, it supposes that the rights of the Spanish consul, a public officer residing here under the protection of the United States Government, are quite different from those of the Spanish subjects who have come into the country to mingle with our own citizens, and here to pursue their private business and objects. The former may claim special indemnity, the latter are entitled to such protection as is afforded to our own citizens. While, therefore, the losses of individuals, private Spanish subjects, are greatly to be regretted, yet it is understood that many American citizens suffered equal losses from the same cause. And these private individuals, subjects of Her Catholic Majesty, coming voluntarily to reside in the United States, have certainly no cause of complaint, if they are protected by the same law and the same administration of law, as native born citizens of this country.

"They have in fact some advantages over the citizens of the State in which they happen to be, inasmuch as they are enabled, until they become citizens themselves, to prosecute for any injuries done to their persons or property in the courts of the United States, or the State courts, at their election.

"The President is of opinion, as already stated, that, for obvious reasons, the case of the consul is different, and that the Government of the United States should provide for Mr. Laborde a just indemnity; and a recommendation to that effect will be laid before Congress, at an early period of its approaching session. This is all which it is in his power to do. The case may be a new one, but the President being of opinion that Mr. Laborde ought to be indemnified, has not thought it necessary to search for precedents."

Mr. Webster, Sec. of State, to Mr. Calderon de la Barca, Nov. 13, 1851. MSS. Notes, Spain.

In respect to the riots of 1851 at New Orleans, see further correspondence in House Ex. Doc. 2, 32d Cong., 1st sess.; Mr. Frelinghuysen to Mr. Baker, Apr. 18, 1884; MSS. Inst., Venez.

Mr. Webster's report to the President and the President's message in respect to indemnity for Spanish subjects for injuries in New Orleans, Aug., 1851, are given in House Ex. Doc. 113, 32d Cong., 1stsess. See also *infra*, § 241

The claim based on indignity to the Spanish flag is discussed *supra*, § 121.

The Imperial Government of Brazil is liable as such to the Government of the United States for injuries inflicted in one of its provinces by a mob which was set on by the governor of the province.

Mr. Fish, Sec. of State, to Mr. Partridge, Feb. 27, 1875. MSS. Inst., Brazil.

"There is at least one signal instance in our own history where this Government has indemnified foreigners for the loss of their property from a mob. The riots at New Orleans and Key West are referred to, when the houses and shops of many Spaniards there were sacked. It is true that Mr. Webster, in a note to Mr. Calderon on the subject, stated that the reparation was voluntarily made, and not from any sense of obligation on the part of this Government under the law of nations. In that case, however, there was no proof, or, as is understood, even any charge that the riot was instigated by those authorities who were charged with the duty of preserving the public peace. It is not improbable that if those authorities had professedly instigated the riot Mr. Webster's opinion as to the responsibility of this Government might have been different, especially if the sufferers should have been without a remedy through the courts.

"It is the duty of Brazil, when she receives the citizens of a friendly state, to protect the property which they carry with them or may acquire there. If persons in the service of that Government connive at or instigate a riot for the purpose of depriving a citizen of the United States of his property, the Imperial Government must be held accountable therefor."

Mr. Fish, Sec. of State, to Mr. Partridge, Mar. 5, 1875. MSS. Inst., Brazil.

A Government is liable internationally for damages done to alien residents by a mob which by due diligence it could have repressed.

Mr. Evarts, Sec. of State, to Mr. Gibbs, May 28, 1878. MSS. Inst., Peru.

"Unlike the case now being considered, which occurred under the immediate eyes of the Government, the case referred to by the attorney took place in a sea-board town more than a thousand miles distant from the capital of the United States. The character of that case and the action of Congress thereon appear in the following copy of a resolution of Congress March 3, 1853:

"*Resolved, &c.*, That the President of the United States be, and is hereby, requested to cause an investigation to be made of any losses that may have been sustained by the consul of Spain and other persons residing at New Orleans or at Key West in the year eighteen hundred and fifty-one, and who at that time were subjects of the Queen of Spain, by the violence of individuals arising out of intelligence then recently received at those places of the execution of certain persons at Havana, in Cuba, by the Spanish authorities of that island, and that such losses so ascertained to persons at that time subjects as aforesaid, on the certificate of the Secretary of State that the same are proven to the satisfaction of the President, together with the reasonable costs of the investigation, shall be paid to those entitled out of any money in the Treasury not otherwise appropriated.

"The Spanish sufferers from that *emeute* were accordingly indemnified."

Ibid.

In 1880 certain British subjects were injured by a mob in Texas. It was held by the Secretary, after consulting the Attorney-General, that as the offense "was against the peace and dignity of Texas," it was "cognizable only by the authorities of that State. So far as their legal remedy against the assailants is concerned, the Dows (the parties injured) stand as to their natural and civil rights in precisely the same condition as to recourse to the State tribunals as the citizens of that State; and, in their capacity of British subjects, they can resort also to the courts of the United States at their option for civil redress and indemnity."

Mr. Evarts, Sec. of State, to Sir E. Thornton, May 22, 1880. MSS Notes, Gr. Brit.

The message of President Cleveland, Mar. 2, 1886, and the note of Mr. Bayard, Sec. of State, to the Chinese minister, of Feb. 18, 1886, in reference to the riotous attack on the Chinese in Wyoming Territory, in Sept., 1885, are given *supra*, § 67.

VI. *CLAIMS BASED ON SPOLIATIONS.*

(1) Foreign neutrals liable for breach of neutrality.

§ 227.

As to noutral duties in this relation, see *infra*, § 399.

The fact that Spain was at the time in alliance with France in a war against England does not relieve Spain from liability to the United States for the spoliation of United States merchant vessels in Spanish ports by French privateers.

Mr. Adams, Sec. of State, to Mr. De Onis, Mar. 12, 1818; MSS. Notes, For. Leg.

If, through the negligence of the Government of the United States, ports of the United States are made the base of naval operations against a belligerent in a war in which the United States is neutral, the Government of the United States may, on proof of negligence, be liable internationally to such belligerent for the loss.

Mr. Clay, Sec. of State, to Mr. Rivas y Salmon, June 9, 1827. MSS. Notes, For. Leg. See Mr. Clay to Mr. Tacon, Oct. 29, 1827; *ibid.* See *infra*, § 396.

But the Government of the United States is not liable to foreign Governments for misconduct of its private citizens within their jurisdiction, such citizens not being in any sense its representatives.

Mr. Forsyth, Sec. of State, to Mr. Calderon de la Barca, Sept. 17, 1839. MSS. Notes, Spain. See *supra*, § 205.

"For all the losses and damages which the Government and citizens of the United States have sustained by the depredations of the vessels

in question, the United States, as they believe, justly hold the governments of the countries from which they have proceeded responsible, whenever they have been duly forewarned and have omitted proper measures to prevent the departure of such hostile expeditions."

Mr. Seward, Sec. of State, to Mr. Dayton, Dec. 17, 1863. MSS. Inst., France. *Infra*, § 396.

The Government of the United States is not liable to Hayti for armed vessels escaping from United States ports, manned by insurgents against Hayti, when such escape was not imputable to the negligence or connivance of the United States.

Mr. Fish, Sec. of State, to Mr. Bassett, Oct. 13, 1869. MSS. Inst., Hayti. *Infra*, § 396.

A neutral is liable to a belligerent for damages sustained by the latter's citizens from cruisers belonging to the other belligerent, whose fitting up and issue the neutral negligently permitted.

Geneva conference, *infra*, §§ 396, 402*a*.

Claims for advanced rates of insurance and for loss of custom for the merchant service caused by a neglect of neutral duty, or for prospective contingent earnings, do not form a basis for an international claim against the neutral.

4 Papers relating to Treaty of Washington, 20; *ibid.*, 53.

It was held by the Geneva commission that "the loss in the transfer of the American commercial marine to the British flag," "the enhanced payments of insurance," and the prolongation of the war and its consequent expenses (those several conditions being alleged to result from the depredations by the Confederate cruisers fitted in British ports) "do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations."

4 Papers relating to Treaty of Washington, 20; *infra*, § 402*a*.

The Geneva commission, by a majority of three to two, held that "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."

4 Papers relating to Treaty of Washington, 53; *infra*, §§ 396, 402*a*.

Other questions relating to violation of neutral duties are discussed, *infra*, §§ 395*ff*. The proceedings of the Geneva conference are examined more fully, *infra*, §§ 396, 402*a*.

The correspondence of the United States with Portugal relative to the claims of American citizens against Portugal will be found in Brit and For. St. Pap., 1853–'54, 1134.

"The destruction of the American armed brig General Armstrong by a British man-of-war, in the harbor of Fayal, in 1814, gave rise to a long-continuing correspondence, which resulted, in 1851, in an agreement to refer the claims growing out of it to 'the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties.' The President of the French Republic (afterwards

Napoleon III) was selected as the arbiter. This decision was adverse to the United States."

Mr. J. C. B. Davis, Notes, &c. *Infra*, §§ 248, 399, 401.

The following is a translation of the material parts of the decision:

"Considering that it is clear, in fact, that the United States were at war with Her Britannic Majesty, and Her Most Faithful Majesty preserving her neutrality, the American brig the General Armstrong, commanded by Captain Reid, legally provided with letters of marque, and armed for privateering purposes, having sailed from the port of New York, did, on the 26th of September, 1814, cast anchor in the port of Fayal, one of the Azores Islands, constituting part of Her Most Faithful Majesty's dominions;

"That it is equally clear that, on the evening of the same day, an English squadron, commanded by Commodore Lloyd, entered the same port;

"That it is no less certain that, during the following night, regardless of the rights of sovereignty and neutrality of Her Most Faithful Majesty, a bloody encounter took place between the Americans and the English; and that on the following day, the 27th of September, one of the vessels belonging to the English squadron came to range herself near the American privateer for the purpose of cannonading her; that this demonstration, accompanied by the act, determined Captain Reid, followed by his crew, to abandon his vessel, and to destroy her;

"Considering that if it be clear that, on the night of the 26th of September, some English long-boats, commanded by Lieutenant Robert Fausset, of the British navy, approached the American brig the General Armstrong, it is not certain that the men who manned the boats aforesaid were provided with arms and ammunition;

"That it is evident, in fact, from the documents which have been exhibited, that the aforesaid long-boats, having approached the American brig, the crew of the latter, after having hailed them and summoned them to be off, immediately fired upon them, and that some men were killed on board the English boats, and others wounded—some of whom mortally—without any attempt having been made on the part of the crew of the boats to repel at once force by force;

"Considering that the report of the governor of Fayal proves that the American captain did not apply to the Portuguese Government for protection until blood had already been shed, and, when the fire had ceased, the brig General Armstrong came to anchor under the castle at a distance of a stone's-throw; that the said governor states that it was only then that he was informed of what was passing in the port; that he did, on several occasions, interpose with Commodore Lloyd, with a view of obtaining a cessation of hostilities, and to complain of the violation of a neutral territory;

"That he effectively prevented some American sailors, who were on land, from embarking on board the American brig for the purpose of prolonging a conflict which was contrary to the law of nations;

"That the weakness of the garrison of the island, and the constant dismantling of the forts, by the removal of the guns which guarded them, rendered all armed intervention on his part impossible;

"Considering, in this state of things, that Captain Reid, not having applied from the beginning for the intervention of the neutral sovereign, and having had recourse to arms in order to repel an unjust aggression of which he pretended to be the object, has thus failed to respect the neutrality of the territory of the foreign sovereign, and released that sovereign of the obligation in which he was, to afford him protection by any other means than that of a pacific intervention;

"From which it follows that the Government of Her Most Faithful Majesty cannot be held responsible for the results of the collision which took place in contempt of her rights of sovereignty, in violation of the neutrality of her territory, and without the local officers or lieutenants having been required in proper time, and enabled to grant aid and protection to those having a right to the same;

"Therefore we have decided, and we declare, that the claim presented by the Government of the United States against Her Most Faithful Majesty has no foundation, and that no indemnity is due by Portugal in consequence of the loss of the American brig the General Armstrong, armed for privateering purposes."

For the report of the Committee on Foreign Relations of the Senate on the claim of the brig "General Armstrong," see referenees, *infra*, § 399, and further points relative thereto, *infra*, §§ 248, 401.

(2) FOREIGN BELLIGERENTS LIABLE FOR ABUSE OF BELLIGERENCY.

§ 228.

"I have it in charge from the President to assure the merchants of the United States concerned in foreign commerce or navigation that due attention will be paid to any injuries they may suffer on the high seas or in foreign countries contrary to the law of nations or to existing treaties, and that on the forwarding hither of well authenticated evidence of the same, proper proceedings will be adopted for their relief."

Mr. Jefferson, Sec. of State, to Messrs. Duke & Co., Aug. 31, 1793. 4 Jeff. Works, 31. See *infra*, §§ 338 *ff*.

"While in our external relations some serious inconveniences and embarrassments have been overcome and others lessened, it is with much pain and deep regret I mention that circumstances of a very unwelcome nature have lately occurred. Our trade has suffered and is suffering extensive injuries in the West Indies from the cruisers and agents of the French Republic; and communications have been received from its minister here which indicate the danger of a further disturbance of our commerce by its authority, and which are in other respects far from agreeable.

"It has been my constant, sincere, and earnest wish, in conformity with that of our nation, to maintain cordial harmony and a perfectly friendly understanding with that Republic. This wish remains unabated, and I shall persevere in the endeavor to fulfill it to the utmost extent of what shall be consistent with a just and indispensable regard to the rights and honor of our country; nor will I easily cease to cherish the expectation that a spirit of justice, candor, and friendship on the part of the Republic will eventually insure success."

President Washington, Eighth Annual Address, 1796.

The course taken by the Government in reference to litigation consequent on the capture of United States vessels by British cruisers in 1795–'96 is thus stated by Mr. Pickering in a letter dated October 29, 1796, to Mr. King:

"The captures, under the most familiar appellation of *spoliations*, were considered as violations of the law of nations. The citizens thus spoiled of their property claimed, and were entitled to, the protection

of the Government. The injury was of a nature so atrocious and so extensive that the ordinary means of address by individual applications in the pursuit of legal remedies seemed to be superseded. These considerations, combined with the necessity of composing the public mind, extremely irritated by such outrages on the rights of our citizens, determined the Government to undertake to procure satisfaction for the sufferers without stipulating for a reimbursement of the expenses which should be incurred, and I fear much difficulty would attend an attempt to recover it."

Mr. Pickering, Sec. of State, to Mr. King, Oct. 26, 1796. MSS. Inst., Ministers. *Infra*, § 347 *ff*.

"That the present Government of France is, by the established principles of public law, responsible for those acts (Napoleon's aggressions) is not, at this day, an open question among civilized nations. The consequences of an opposite doctrine would strike at the root of all confidence in the dealings between different nations. If a people could discharge itself of its obligations by changing a Government of its own establishment, or which it had made legitimate by its acquiescence, all security for national transactions would be at an end and one of the greatest advantages which has been produced by the lights of civilization and improvement defeated. There are no Governments in Europe to which France could look for countenance in maintaining such a doctrine, for there are none who have not themselves acted upon a different principle. The doctrine advanced is no less inconsistent with her own conduct. In the indemnity made by her to the principal powers of Europe in the years 1814 and 1815, not only France but all those powers gave their assent in the most solemn manner to the principle for which the United States contend. It is in vain to say that those indemnities were for the debts of the preceding Government, and not for spoliations, or to refer to the condition of France at that period. There were reasons of the most imperative character, to which it is not necessary to make to you particular references, and which are not applicable to the United States, why the abandonment of claims for spoliations on their part should not furnish a rule for the adjustment of those of which we complain, and France will not, it is believed, avow even now that those who came to deliver her from oppression availed themselves of their power to increase that oppression by making France responsible, without right, for injuries which they themselves had received from the same source. So far from that being then supposed to be the case, the principle of indemnity was claimed by the allies and distinctly admitted by the French plenipotentiaries. * * *

"The [Berlin and Milan] decrees of France, out of which those claims have arisen, were in themselves a violation of the established law of nations, and, as such, no condemnation under them could justify the seizures which had been made, nor exonerate the Government from its

liability to make indemnity whenever the period should arrive in which acts of unmeasured and inexcusable aggression gave way to a just consideration of private rights and a respect for public law. So far as it respects all seizures prior to the 31st of July, 1809 (the period at which the treaty of 1800 terminated), they were in direct contravention to that treaty. But even admitting that France had a right to issue the Berlin and Milan decrees, the manner of their execution was, in most cases, such as to sustain the claims that are now presented. Several confiscations were made by imperial decisions without previous trial or condemnation, in direct violation of the law of nations and of the treaty of 1800, limiting to prize courts the cognizance of such cases."

Mr. Van Buren, Sec. of State, to Mr. Rives, July 20, 1829. MSS. Inst., France. See as to liability for predecessor's spoliations, *supra*, § 137; *infra*, § 236; for subsequent proceedings against France, *infra*, § 318.

"In the present case, the outrageous acts in which the claim originated would not only have justified war at the time, but it has been doubted whether the forbearance used then was entirely free of reproach. France is responsible for France, the present generation for that which is past, the existing Government for that which preceded it. But that responsibility extends only to the payment of damages for former wrongs; of the wrongs themselves the present Government is entirely innocent. The injury now done is a refusal to pay a most just debt, now liquidated by the Executive, and which he has by a treaty promised to pay. That refusal will render legitimate any means America may think proper to adopt for redress, without excepting war itself. If not accompanied by insult or such aggravating circumstances as leave no other resource, the refusal does not impose upon her the necessity of resorting to an appeal to arms."

Mr. Gallatin to Mr. Everett, Jan., 1835. 2 Gallatin's Writings, 495.

A belligerent is responsible to neutrals for capricious and wanton injury inflicted on their persons or property.

Mr. Seward, Sec. of State, to Mr. Dayton, Mar. 13, 1863. MSS. Inst., France.

One belligerent Government is to be held liable for a wanton destruction of neutral property in an invasion of the territory of the other belligerent.

Mr. Frelinghuysen, Sec. of State, to Mr. Logan, June 7, 1883. MSS. Inst., Chili. *Infra*, §§ 347 *ff.* See App., vol. iii, § 228.

The report of Mr. Pickering, Sec. of State, of June 21, 1797, on depredations on the commerce of the United States, since Oct. 1, 1796, is given in 2 Am. St. Pap. (For Rel.), 28. On same topic see 3 Am. St. Pap. (For Rel.), 557 *ff.*

As to spoliations since 1805, see House Doc. 451, 19th Cong., 2d sess.; 6 Am. St. Pap. (For Rel.), 384; in which a table of spoliations of all classes is given.

The message of President J. Q. Adams, of May 23, 1828, containing correspondence in reference to Brazilian spoliations, is contained in House Doc. 498, 20th Cong., 1st sess.; 6 Am. St. Pap. (For Rel.), 1021.

As to Danish spoliations, see *infra*, § 399; 2 Am. St. Pap. (For. Rel.), 609; 3 *ibid.* 521; 8 Wait's St. Pap., 205 *ff.*

For President Madison's Danish spoliation messages, with accompanying documents, see 3 Am. St. Pap. (For Rel.), 328, 344; correspondence of Mr. Wheaton in respect to these claims is given in House Doc. 249, 22d Cong., 1st sess.

As to treaty with Denmark, see *supra*, § 147.

As to French spoliations before 1800, see *infra*, § 248.

As to French spoliation claims, see further, resolution of the legislature of the State of Massachusetts in favor of the passage of a bill to indemnify sufferers by, Dec. 4, 1883, Senate Mis. Doc. 6, 48th Cong., 1st sess.

Petition of claimants asking that the unappropriated balance of the Geneva award be devoted to the payment of the claims, Senate Mis. Doc. 29, 44th Cong. 2d sess.

Favorable report as to appointment of a commission on, House Rep. 1067, 47th Cong., 1st sess. Favorable report, Senate Rep. 306, 48th Cong., 1st sess.

Recommending settlement by Court of Claims, with right of appeal to Supreme Court, House Rep. 109, 48th Cong., 1st sess.

History of, House Rep. 1441, 48th Cong., 1st sess. See *infra*, §§ 148 *ff*.

President Arthur's message of July 3, 1884, transmitting report of the Secretary of State relative to claims of United States citizens against France, Senate Ex. Doc. 205, 48th Cong., 1st sess.

As to French spoliations, the following papers may also be consulted:

Mr. Pickering's report of Feb. 28, 1798, 1 Am. St. Pap. (For. Rel.), 748. See also *infra*, § 402*a*.

For correspondence in 1810 of Mr. Armstrong, minister at Paris, with the French Government and his own Government, see 3 Am. St. Pap. (For. Rel.), 380 *ff*. See *ibid.*, 500 *ff*., for other papers.

In Senate Doc. 437, 19th Cong., 1st sess., 6 Am. St. Pap. (For. Rel.), 3, are given papers relative to spoliations both before and after the convention of 1800.

The correspondence of the United States with France between 1816 and 1822 is given in the Brit. and For. St. Pap. for 1820–'21, vol. 8., 401. See also same work, 1822–'23, vol. 10, 1061; 1824–'25, vol. 12, 623, 624; 1825–'26, vol. 13, 1143.

Other documents relating thereto will be found in House Doc. 369, 18th Cong., 1st sess.; 5 Am. St. Pap. (For. Rel.), 282; Mr. Forsyth's House report of May 24, 1824; House Doc., 376, 18th Cong., 1st sess.

For French spoliations since 1806, see House Doc. 387, 18th Cong., 2d sess.; 5 Am. St. Pap., (For. Rel.), 476. *Supra*, §§ 148 *ff*.

President Jackson's message of December 27, 1834, giving documents connected with the spoliation treaty is in House Ex. Doc. 40, 23d Cong., 2d sess. His message to the Senate, of February 25, 1835, giving the correspondence in that year on the same claims, is in Senate Doc. 145, 23d Cong., 2d sess.

The documents accompanying President Jackson's message on the opening of the first session of the 24th Congress, Dec. 7, 1835, contain additional correspondence as to the French spoliation treaty. Further correspondence on the same subject is attached to the President's message of Jan. 18, 1836, Senate Docs. 62, 63, and Feb. 15, 1836, Senate Doc. 161, 24th Cong., 1st sess. The correspondence as to British mediation will be found attached to the President's message of Feb. 22, 1836, Senate Doc. 187, 24th Cong., 1st sess. See *supra*, § 49; *infra*, §§ 318 *ff*, where the circumstances of the "mediation" are stated. See also House Ex. Docs. 67, 116.

As to President Jackson's further proceedings on these claims, see *infra*, § 318.

As to treaties with France, see *supra*, §§ 148 *ff*.

For valuable list of French spoliation claims documents, see bulletin of the Boston Public Library, Vol. 6, No. 5.

As to British spoliations:

A note of Mr. Monroe, minister to England, to the British foreign secretary, discussing British abuse of belligerent rights, will be found in 2 Am. St. Pap. (For. Rel.) 734 *ff.*

A succinct narrative of the spoliations of Great Britain prior to 1811 is given in the notes of Mr. Monroe, Sec. of State, to Mr. Foster, British minister at Washington, July 23 and Oct. 1, 1811, and Jan. 14, 1812. MSS. Notes, For. Leg. 3 Am. St. Pap. (For. Rel.), 439.

The claims for British violations of neutrality are discussed *supra*, § 227; *infra*, § 397.

The distinction between French and English spoliation in the war of 1812 is thus stated by Mr. C. J. Ingersoll (1 Ingersoll's Late War, 37): "The French decrees were, indeed, as obnoxious in their formation and design as the British orders; but the Government of France claimed and exercised no right of impressment, and the maritime spoliations of France were, comparatively, restricted, not only by her own weakness on the ocean, but by the constant and pervading vigilance of the fleet of her enemy."

The violation of the laws of war incident to the burning of Washington by the British in 1814 is noticed *infra*, § 340.

After the treaty of Ghent the claims for maritime spoliations suffered by citizens of the United States during the preceding European wars may be classified as follows:

Those against Great Britain claimed to be extinguished by the war of 1812.

As against France the claims prior to 1800 had been, it was alleged, assumed by the United States in its negotiations with France in 1800–1803; *infra*, § 248. The subsequent claims were the subjects of constant controversy with France, and were finally liquidated in 1836; *infra*, § 318.

None of the claims against Spain, Holland, Naples, and Denmark had been settled, and these were all the subjects of diplomatic pressure.

As to treaties with Great Britain, see *supra*, § 150 *ff.*

As to the Netherlands, see House Doc. 402, 18th Cong., 2d sess.; 5 Am. St. Pap. (For. Rel.), 585. See as to treaty, *supra*, § 155.

As to Sicily, see report of Mr. J. Q. Adams, House Doc. 295, 15th Cong., 1st sess.; 4 Am. St. Pap. (For. Rel.), 160, containing Mr. Pinkney's correspondence with the Sicilian Government. The correspondence relative to the spoliations under Joachim Murat, when King of Naples, will be found in Senate Doc. 70, 22d Cong., 2d sess. See *infra*, § 236, *supra*, § 137; as to treaty, see *supra*, § 152.

As to Spain, the correspondence in 1803 of Mr. Charles Pinckney, minister at Madrid, with the Spanish Government in reference to Spanish spoliations, is given in 2 Am. St. Pap. (For. Rel.), 596 *ff*, together with the proposed convention of May 23, 1803. See also House Doc. 340, 16th Cong., 1st sess.; 5 Am. St. Pap. (For. Rel.), 36, 834; House Doc. 378, 18th Cong., 2d sess.; 5 Am. St. Pap. (For. Rel.), 368; Senate Rep. 390, 18th Cong., 2d sess.; 5 Am. St. Pap. (For. Rel.), 489.

As to Spanish depredations on commerce of the United States on the Cuban coast in 1820–'21, see papers connected with President Monroe's messages of Jan. 31, 1822, and Feb. 5, 1823, House Doc. 326, 1st sess., 17th Cong.; 4 Am. St. Pap. (For. Rel.), 311.

As to settlement of these claims by cession of Florida, see *supra*, § 161 *a*.

By the convention of 1834 Spain agreed to become responsible in the sum of twelve millions of rials vellon, with interest, for damages inflicted on the commerce of the United States during the struggle of the Spanish American colonies for independence.

Ex. Doc. 147, 2d sess., 23d Cong., 90. See *supra*, § 161 *ff*.

As to Swedish spoliations prior to 1816, see correspondence given by President Monroe on April 18, 1820, Senate Doc. 318, 1st sess., 16th Cong.; 4 Am. St. Pap. (For. Rel.), 635. As to treaty see *supra*, § 162.

As to seizure of steamship Meteor, see Mr. Seward's report, Apr. 3, 1866, Senate Ex. Doc. 39, 39th Cong., 1st sess.; *infra*, § 396.

As has been elsewhere noticed, an alien who knowingly places his goods in a country which is the seat of war, cannot recover their value from the belligerent by whom they are confiscated, if such confiscation was in accordance with the laws of war. See *infra*, §§ 338, 341, 343, 352, 373; *supra*, §§ 203, 224, 228. As authorities on this point see Mrs. Alexander's Cotton, 2 Wall., 404; U. S. *v.* Padelford, 9 Wall., 531; Lamar *v.* Browne, 92 U. S., 187; Young *v.* U. S., 97 U. S., 39, where the subject is fully discussed.

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 *ibid.*, 283.

The probable or possible profits of an unfinished voyage afford no rule to estimate the damages in a case of marine trespass.

The Amiable Nancy, 3 Wheat., 546; La Amistad de Rues, 5 *ibid.*, 385.

The prime cost or value of the property lost, and, in case of injury, the diminution in value by reason of the injury, with interest thereon, affords the true measure of damages in such a case.

The Amiable Nancy, 3 Wheat., 546.

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.

Ibid.

An alleged Danish vessel was seized by an American vessel as French property, on the south side of the island of St. Domingo, and, whilst awaiting examination, under the American flag, was seized by a British ship and taken to Jamaica and there condemned. It was ruled that as the first captors were not liable for capturing and detaining the vessel long enough for examination, nor for the second capture, and as the

Government of the United States is not liable even for the unlawful captures of its subjects, the United States were not bound to indemnify the Danish owner.

1 Op., 106, Lincoln, 1802.

(3) How far public ships are liable for torts.

§ 229.

A claim for damages exists against a vessel of the United States guilty of a maritime tort, as much as if the offending vessel belonged to a private citizen; and although, for reasons of public policy, the claim cannot be enforced by direct proceedings against the vessel, yet it will be enforced, by the courts, whenever the property itself, upon which the claim exists, becomes, through the affirmative action of the United States, subject to their jurisdiction and control. Therefore, where a prize ship, in charge of a prize-master and crew, committed a maritime tort by running into and sinking another vessel, the damages of the owners of the latter were ordered to be assessed and paid out of the proceeds of the sale of the former, before distribution to the captors.

The Siren, 7 Wall., 152.

VII. *CLAIMS BASED ON DENIAL OR UNDUE DISCRIMINATION OF JUSTICE.*

(1) Such claims ground for interposition.

§ 230.

As to protection of citizens abroad, see *supra*, § 180.

"It is obvious enough that when we ask redress from a Government and not from their tribunals for injuries arising from flagrant violations of the law of nations, it is preposterous to refuse it, because the injury has been consummated, the capture, trial, and condemnation under unlawful decrees being all part of the same system, *to which the final (judicial) process and decision can give no sanction.*"

Mr. Gallatin to Mr. Price, Feb. 11, 1824; 2 Gallatin's Writings, 278. See *infra*, §§ 238, 329*a*; *supra*, § 189.

"The proposition that those who resort to foreign countries are bound to submit to their laws as expounded by the judicial tribunals is not disputed. The exception to this rule, however, is that when palpable injustice, that is to say, such as would be obvious to all the world, is committed by that authority towards a foreigner, for alleged infractions of municipal law, of treaties, or of the law of nations, the Government of the country whereof the foreigner is a citizen or subject has a clear right to hold the country whose authorities have been guilty of the wrong, accountable therefor. This right is not weakened because the judicial may be independent of the executive, or both of the legislative

power. Complaint is made to the executive by the foreign Government because that is the only proper medium and organ of communication, and not because it may be supposed to be within the competency of that department to redress the grievance."

Mr. Forsyth, Sec. of State, to Mr. Semple, Feb. 12, 1839. MSS. Inst., Colombia.

"Our citizens who resort to countries where the trial by jury is not known, and who may there be charged with crime, frequently imagine, when the laws of those countries are administered in the forms customary therein, that they are deprived of rights to which they are entitled, and therefore may expect the interference of their own Government. But it must be remembered, in all such cases, that they have of their own free will elected a residence out of their native land, and preferred to live elsewhere, and under another Government, and in a country in which different laws prevail.

"They have chosen to settle themselves in a country where jury trials are not known; where representative government does not exist; where the privilege of the writ of *habeas corpus* is unheard of, and where judicial proceedings in criminal cases are brief and summary. Having made this election, they must necessarily abide its consequences. No man can carry the ægis of his national American liberty into a foreign country, and expect to hold it up for his exemption from the dominion and authority of the laws and the sovereign power of that country, unless he is authorized to do so by virtue of treaty stipulations."

Report of Mr. Webster, Sec. of State, to the President, Dec. 23, 1851. 6 Webster's Works, 527, 528. Thrasher's case. See as to this case, *supra*, §§ 190, 203; *infra*, §§ 244, 257.

The refusal of a Chilian court, in 1852, on the trial for crime of an American citizen, to hear testimony on behalf of the defendant, would, if sustained by the Chilian Government, be considered by the United States as "a gross outrage to an American citizen, for which it will assuredly hold Chili responsible."

Mr. Conrad, Acting Sec. of State, to Mr. Peyton, Oct. 12, 1852. MSS. Inst., Chili.

The Government of Chili is responsible to the United States for the spoliation of property belonging to citizens of the United States by officers of Chili.

Mr. Everett, Sec. of State, to Mr. Carvallo, Feb. 23, 1853. MSS. Notes, Chili.

"The system of proceedings in criminal cases in the Austrian Government has, undoubtedly, as is the case in most other absolute countries, many harsh features, and is deficient in many safeguards which our laws provide for the security of the accused; but it is not within the competence of one independent power to reform the jurisprudence of others, nor has it the right to regard as an injury the application of the judicial system and established mode of proceedings in foreign coun-

tries to its citizens when fairly brought under their operation. All we can ask of Austria, and this we can demand as a right, is, that in her proceedings against American citizens prosecuted for offenses committed within her jurisdiction, she should give them the full and fair benefit of her system, such as it is, and deal with them as she does with her own subjects or those of other foreign powers. She cannot be asked to modify her mode of proceedings to suit our views, or to extend to our citizens all the advantages which her subjects would have under our better and more humane system of criminal jurisprudence."

Mr. Marcy, Sec. of State, to Mr. Jackson, Apr. 6, 1855. MSS. Inst., Austria.

"Should it, however, be established to your satisfaction that Dr. Belcredi is an American citizen, the right of this Government to interfere in his case would be very questionable. As such citizen, he is subject to the laws, civil and criminal, of the country within which he is domiciled or resides, and the United States could not make the proceedings against him a ground of complaint unless those laws were contrary to treaty stipulations or were used in bad faith or oppressively to inflict injuries upon him."

Mr. Marcy, Sec. of State, to Mr. Fay, Nov. 16, 1855. MSS. Inst., Switz.

"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 contributions 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, Second Annual Message, 1858.
As to inequality of taxation, see *supra*, § 204.
As to protection generally, see *supra*, § 189.

"It is quite true, for example, that under ordinary circumstances when citizens of the United States go to a foreign country they go with an implied understanding that they are to obey its laws, and submit themselves, in good faith, to its established tribunals. When they do business with its citizens, or make private contracts there, it is not to be expected that either their own or the foreign Government is to be made a party to this business or these contracts, or will undertake to determine any disputes to which they may give rise. The case, however, is very much changed when no impartial tribunals can be said to exist in a foreign country, or when they have been arbitrarily controlled by the Government to the injury of our citizens. So, also, the case is widely different when the foreign Government becomes itself a party to important contracts, and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time and labor and capital from a reliance upon its own good faith and justice."

Mr. Cass, Sec. of State, to Mr. Dimitry, May 3, 1860. MSS. Inst., Am. States.

A fraudulent decision by a foreign judge condemning an American ship, is a ground for a demand for redress by this Government from the Government of such judge.

Mr. Seward, Sec. of State, to Mr. Webb, Dec. 7, 1867. MSS. Inst., Brazil. See *infra*, § 329*a*.

"I have therefore to instruct you to bring this whole subject to the notice of the Spanish Government, and to say that the President hopes that immediate steps will be taken for the release of all the citizens of the United States who may be held in custody in Cuba in violation of the provisions of the treaty of 1795, or for their immediate trial under the guarantees and with the rights secured by that treaty. You are also instructed to ask for the restoration to the citizens of the United States of their properties and estates, so far as the same have been arbitrarily embargoed in violation of the provisions of that treaty. You will also endeavor to secure some mode for the early and equita-

ble indemnification and satisfaction to the several parties, whose rights have been violated, of the amounts which should rightfully come to each claimant for the illegal detention of his property or his person. You will say that this suggestion is made in the interest of peace, of justice, and of good will, in order to secure a measure of damages in each case which shall be just as between the two Governments. You will also say that it is extremely desirable to have the investigation conducted in this country. It cannot be done in Spain without subjecting the claimants to unnecessary expense. It cannot be done in Cuba, at present, without subjecting many of them to personal danger. In this connection I must again, on behalf of this Government, express, in the interest of good will and of the continued good understanding which we desire to maintain with Spain, the strong desire of the President that the Government at Madrid will confer fresh powers upon Mr. Lopez Roberts (or upon such other person on this side of the Atlantic as may be selected for that purpose) to arrange all such questions with this Government.

"The Spanish authorities in Cuba seem to be clothed with absolute power for the commission of such acts as are now complained of, but when redress is sought, we are referred to the distant Cabinet of Madrid, where it is often found necessary to refer again to Cuba for information, and the case is thus suspended and delayed, to the grievous injury of the parties and at the hazard of irritation from the delay of which the necessity is not apparent to the impatient sufferers or to the public.

"The President has respected the Spanish claim of sovereignty over the Island of Cuba during the present contest against a strong sympathetic pressure from without. Spain owes it to the United States as well as to her own traditional honor and sense of justice that her sovereignty shall not be used for the oppression and injury of the citizens of this Republic."

Mr. Fish, Sec. of State, to Mr. Sickles, June 24, 1870. MSS. Inst., Spain; For. Rel., 1870.

"I inclose a copy of a decree said to have been made by a military tribunal in Cuba, and published in the Diario de la Marina on the 9th of November, current.

"This decree purports to condemn to death sundry persons named in it as the central republican junta of Cuba and Porto Rico, established in New York, and to confiscate their property. It appears affirmatively in the decree that none of the condemned had appeared before the court.

"This revolutionary body, known as the Cuban junta, voluntarily disbanded itself about one month before this decree was made, and announced its intention to discontinue any hostile purpose it might have entertained against Spanish rule in Cuba. During its previous history its acts, so far as conflicting with the laws of the United States and the international duties of this Government, were repressed by the Presi-

dent. This Department has also been officially informed by Mr. Roberts that the state of affairs in Cuba is regarded as a favorable one by the Spanish Government, and that in consequence of that the extraordinary powers previously vested in him had been withdrawn. This Government has, therefore, seen with surprise and regret the announcement of a policy in Cuba which is apparently uncalled for by any present emergencies, which is not in harmony with the ideas now entertained by the most enlightened nations as to the treatment of political offenses, and which, as it appears to us, will tend to continue the unhappy disturbances which exist in Cuba. We recognize, however, that so far as this is a purely domestic question between the Government of Spain and the persons or properties of those who are subject to that Government, the United States have no other right to interpose than that growing out of the friendly relations which have always existed between them and Spain, and the good faith with which they have observed their duties and obligations in the contest. It appears, however, that on this list are to be found the names of some persons who claim to be citizens of the United States. As to each such person, you will inform the minister for foreign affairs that, if it shall appear that his claim to be a citizen of the United States is valid, and that he has done no act to forfeit his rights as such, it will be claimed and insisted that he is entitled to the trial by civil tribunal, and in the ordinary forms of law which are guaranteed to citizens of the United States by the article of the treaty of 1795 which has already been made the subject of correspondence between you and the Spanish Government."

Mr. Fish, Sec. of State, to Mr. Sickles, Nov. 25, 1870. MSS. Inst., Spain; For. Rel., 1871.

"It is understood to be the usual custom of the courts of the United States and the several States near the border, to permit the gentlemen of the Canadian bar to appear as counsel for British subjects; but this is an act of courtesy and comity, not an admission of a right, and if the courts of Manitoba do not extend the same courtesy to the bar of the United States, we can only regret their decision, but cannot officially complain of it."

Mr. Davis, Acting Sec. of State, to Mr. Austin, July 17, 1873. MSS. Dom. Let.

When there is a denial of justice in Canada in a particular case of wrong inflicted in Canada on citizens of the United States, the case is one for diplomatic intervention.

Mr. Fish, Sec. of State, to Sir E. Thornton, Sept. 4, 1873. MSS. Notes, Gr. Brit.

"It may, in general, be true that when foreigners take up their abode in a country they must expect to share the fortune of the other inhabitants, and cannot expect a preference over them. While, however, a Government may construe according to its pleasure its obligation to protect its own citizens from injury, foreign Governments have

a right, and it is their duty, to judge whether their citizens have received the protection due to them pursuant to public law and treaties. It may be the abstract right of a Government to exclude foreigners entirely from its territories. This right, however, has rarely been exercised in modern times. Whenever it is waived, this step imparts to the Government to whom the foreigners may owe their allegiance the right of seeing that the duty of the other Government toward them is fulfilled. An acknowledgment of this right is not, under the circumstances, as Mr. Lafragua seems to suppose, tantamount to making unjust and invidious discriminations in favor of foreigners and against citizens. It cannot be acknowledged, as Mr. Lafragua maintains, that diplomatic interference in such cases necessarily annihilates or trenches upon the peculiar functions of the judiciary of a country. In cases of a denial of justice the right of intervention through the diplomatic channel is allowed, and justice may as much be denied when, as in this case, it would be absurd to seek it by judicial process, as if it were denied after having been so sought."

Mr. Fish, Sec. of State, to Mr. Foster, Dec. 16, 1873. MSS. Inst., Mex.

Unjust discrimination against a citizen of the United States in a foreign country by which he is subjected to peculiarly harsh imprisonment and other injuries forms a basis of a claim for damages against the Government of such foreign state.

Mr. Fish, Sec. of State, to Mr. White, Jan. 7, 1874; MSS. Inst., Arg. Rep. *Supra*, § 189.

"I duly received and have taken into deliberate consideration your note of the 30th ultimo and the accompanying documents. It presents a claim against this Government for the alleged murder of Mexican shepherds on an estate belonging to Don Toribio Lozano, of Neuvo Leon, Mexico, which estate is situated in Nueces, Tex., and for damages resulting therefrom. Though I have been much struck with the moderation, clearness, and fullness of your statement, I have not been able to reach your conclusion as to the accountability of this Government in the case referred to or in others of a similar character. I am not aware that any Government is answerable in pecuniary damages for the murder of individuals by other individuals within its jurisdiction.

"It is undoubtedly the duty of a Government to prosecute such offenders according to law, by all means in its power. If this duty be honestly and diligently fulfilled the obligation of a Government in such a case is discharged. Though the crime by which the Mexican shepherds are alleged to have lost their lives may not be without precedent, it seems obviously unreasonable, in view of the peculiar condition of the quarter where it was perpetrated, to expect that it would certainly be punished. This seems especially true when it is taken into consideration that, under the system of law which pervades this country, no person can be arrested upon suspicion of having committed a crime except upon the

affidavit of a credible witness. The affidavit referred to must specify the name of the accused party. It is not alleged in your note that the course adverted to was pursued in this case. If it was disregarded voluntarily or through necessity, I cannot discern where the responsibility of this Government begins.

"Mexicans in Texas and Americans in Mexico who engage in business near the border must not at present, or perhaps for some time to come, expect either Government to insure them against all the risks inseparable from such enterprises. If the obligations of both Governments under treaties and the public law are conscientiously fulfilled, nothing more, it is believed, can justly be looked for."

Mr. Fish, Sec. of State, to Mr. Mariscal, Feb. 19, 1875. MSS. Notes, Mex.; For. Rel., 1875.

"I have the honor to acknowledge the receipt of your note of the 8th instant, alleging that two Mexicans, named Mateo Roble and Gabriel Leyva, respectively, were, some time since, murdered in Texas. In proof of this charge, your note is accompanied by the affidavits of certain persons, no one of whom, however, claims to have witnessed the homicides. They all speak of them as matters of public notoriety. Even the names of the supposed culprits are not mentioned. It seems clear that testimony of this character can scarcely be made the basis of any specific proceeding. It is noticed, too, that Leyva is said to have been carried to the bank of the Rio Grande by order of a judge in Texas. This statement, likewise, is so incredible on its face as to serve as its own refutation. It may be affirmed with confidence that the punishment of banishment is not provided for any offense which may be committed in Texas. Without such a provision, no judge there would take upon himself the infliction of such a penalty.

"As the purpose of your communication, however, is that the attention of the governor of Texas may be invited to the subject, I have the honor to add that this Department has addressed a letter to him in regard to it."

Same to same, Mar. 18, 1875; *ibid.*

"I have had the honor to receive your note of the 9th instant upon the subject of the alleged murder of certain Mexican shepherds in the western part of Texas. You allege that neglect to prosecute the offenders would be a denial of that justice which your Government has a right to expect. Your allegation is entirely concurred in. It is not perceived, however, where the neglect imputed began, or who have been guilty of it.

"A large part of the State of Texas is but very sparsely peopled; and in that remote and extended region the police is small in the same proportion with the population, and there, as in all regions similarly situated, the prevention, detection, and punishment of crime is difficult, if not, at times, impossible.

"The character of a border population in such country, comprising but too often lawless persons of the nationalties of each of the coterminous States, and refugees from the laws of all nationalities, who alternately assume the character of citizens of either of the bordering States, so notoriously adds to the difficulty of maintaining order and enforcing laws, that those who voluntarily seek residence or resort thither must be presumed to be aware of the risks thus incurred.

"But if, as is alleged, murders have been committed, the same rules of evidence, in regard to crimes charged to have been committed in that quarter must be applied as would be applicable to their commission in the more densely peopled parts of the State, where, it may be presumed, the law may be executed with greater facility and certainty.

"You will do me the justice to believe that if the Mexican shepherds were murdered, as you allege, no one would deplore it more than myself, or would do more towards having the guilty parties prosecuted according to law.

"A copy of your note on this subject shall be communicated to the governor of Texas, and his attention shall be seriously invited to the subject."

Same to same, Mar. 18, 1875; *ibid.*

"I have the honor to acknowledge the receipt of your note of the 29th ultimo, relative to the alleged murder of certain Mexican shepherds in the western quarter of Texas. It assumes that in the note of this Department, of the 18th ultimo, the right of your Government to consider that there has been a denial of justice in the matter is acknowledged. This assumption, however, is believed not to be warranted by the phraseology of that note. Murder, in this country, can only be prosecuted upon information, under oath, as to the fact and as to the perpetrators. This Department is not aware that there has been any such information in this case. Had there been, and had the proper authorities then refused or neglected to prosecute the offenders, there would have been ground for the charge that there had been a denial of justice. At present there has been no such denial, as there has been no application in that shape only in which it can legally be entertained."

Same to same, Apr. 6, 1875; *ibid.*

"This Government has not claimed that citizens of the United States, who place themselves in a foreign jurisdiction, carry with them the particular immunities surrounding trials in their own country, nor has it insisted that peculiar advantages to the accused, such as trial by jury and the *habeas corpus*, are or must be a part of the jurisprudence of foreign countries.

"But we have claimed that by international law, and by the usages and customs of civilized nations, a trial at law must be conducted with-

out unseemly haste, with certain safeguards to the accused, and in deference to certain recognized rights, in order to mete out justice.

"It was for the purpose of securing to our citizens such well-known rights and privileges that article seven is found among the provisions of our treaty of 1795. * * *

"It certainly cannot be said that an accused person has all the benefits of our treaty, where the defender appointed refused to read the defense provided, when the accused was not present at a considerable portion of the trial, and where no counsel was allowed or provided, in the proper sense of the term, as the military officer defending him practically admitted his culpability.

"Moreover, you cannot fail to remember that the prisoners of the Virginius reached Santiago de Cuba in the evening of November 1; that the next morning at 9 o'clock a council of war was convened on board the Tornado; that its labors were completed at 4 o'clock in the afternoon; that the consular officer who demanded of General Burriel permission to advise with his countrymen was in a gross manner denied access to them; that the sentences were not confirmed, and the executions were hastened for fear that they would be stopped by superior authority. * * *

"In fine, if trial by military courts, as it has been practiced in Cuba, is to be continued, it is difficult to see how, in cases in which justice and moderation are most required, such form can supply the guarantees to which, in the opinion of this Government, our citizens are entitled, and the absence of which will and must cause frequent and dangerous differences."

Mr. Fish, Sec. of State, to Mr. Cushing, Dec. 27, 1875. MSS. Inst., Spain. See *infra*, § 327.

"*Protocol of a conference held at Madrid, on the 12th of January, 1877, between the Hon. Caleb Cushing, minister plenipotentiary of the United States of America, and his excellency Señor Don Fernando Calderon y Collantes, minister of state of His Majesty the King of Spain.*

"The respective parties, mutually desiring to terminate amicably all controversy as to the effect of existing treaties in certain matters of judicial procedure, and for the reasons set forth and representations exchanged in various notes and previous conferences, proceeded to make declaration on both sides as to the understanding of the two Governments in the premises, and respecting the true application of said treaties.

"Señor Calderon y Collantes declared as follows:

"1. No citizen of the United States residing in Spain, her adjacent islands, or her ultramarine possessions, charged with acts of sedition, treason, or conspiracy against the institutions, the public security, the integrity of the territory, or against the supreme Government, or any other crime whatsoever, shall be subject to trial by any exceptional tribunal, but exclusively by the ordinary jurisdiction, except in the case of being captured with arms in hand.

"2. Those who, not coming within this last case, may be arrested or imprisoned, shall be deemed to have been so arrested or imprisoned by order of the civil authority for the effects of the law of April 17, 1821, even though the arrest or imprisonment shall have been effected by armed force.

"3. Those who may be taken with arms in hand, and who are therefore comprehended in the exception of the first article, shall be tried by ordinary council of war, in conformity with the second article of the hereinbefore-mentioned law; but even in this case the accused shall enjoy for their defense the guarantees embodied in the aforesaid law of April 17, 1821.

"4. In consequence whereof, as well in the cases mentioned in the third paragraph as in those of the second, the parties accused are allowed to name attorneys and advocates, who shall have access to them at suitable times; they shall be furnished in due season with copy of the accusation and a list of witnesses for the prosecution, which latter shall be examined before the presumed criminal, his attorney and advocate, in conformity with the provisions of articles twenty to thirty-one of the said law; they shall have right to compel the witnesses of whom they desire to avail themselves to appear and give testimony or to do it by means of depositions; they shall present such evidence as they may judge proper; and they shall be permitted to be present and to make their defense, in public trial, orally or in writing, by themselves or by means of their counsel.

"5. The sentence pronounced shall be referred to the audiencia of the judicial district, or to the Captain-General, according as the trial may have taken place before the ordinary judge or before the council of war, in conformity also with what is prescribed in the above-mentioned law.

"Mr. Cushing declared as follows:

"1. The Constitution of the United States provides that the trial of all crimes except in cases of impeachment shall be by jury, and such trial shall be held in the State where said crimes shall have been committed, or when not committed within any State the trial will proceed in such place as Congress may direct (Art. III, § 2); that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment of a grand jury except in cases arising in the land and naval forces or in the militia when in actual service (Amendments to the Constitution, Art. V); and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have counsel for his defense (Amendments to the Constitution, Art. VI).

"2. The act of Congress of April 30, 1790, chap. 9, sec. 29, re-enacted in the Revised Statutes, provides that every person accused of treason shall have a copy of the indictment and a list of the jury, and of the witnesses to be produced at the trial, delivered to him three days before the same, and in all other capital cases two days before that takes place; that in all such cases the accused shall be allowed to make his full defense by counsel learned in the law, who shall have free access to him at all seasonable hours; that he shall be allowed in his defense to make any proof which he can produce by lawful witnesses, and he shall have due power to compel his witnesses to appear in court.

"3. All these provisions of the Constitution and of acts of Congress are of constant and permanent force, except on occasion of the temporary suspension of the writ of *habeas corpus*.

"4. The provisions herein set forth apply in terms to all persons accused of the commission of treason or other capital crimes in the United States, and therefore, as well by the letter of the law as in virtue of existing treaties, the said provisions extend to and comprehend all Spaniards residing or being in the United States.

"Señor Calderon y Collantes then declared as follows:

"In view of the satisfactory adjustment of this question in a manner so proper for the preservation of the friendly relations between the respective Governments, and in order to afford to the Government of the United States the completest security of

the sincerity and good faith of His Majesty's Government in the premises, command will be given by royal order for the strict observance of the terms of the present protocol in all the dominions of Spain and specifically in the Island of Cuba.

"In testimony of which we have interchangeably signed this protocol.

"CALEB CUSHING.

"FERNDO. CALDERON Y COLLANTES.

The above is to be regarded as simply an opinion by the parties as to the state of the law in this relation in the United States and Spain. As to the United States it has not the force of a law.

Supra, § 131.

"It has, from the very foundation of this Government, been its aim that its citizens abroad should be assured of the guarantees of law; that accused persons should be apprised of the specific offense with which they might be charged; that they should be confronted with the witnesses against them; that they should have the right to be heard in their own defense, either by themselves or such counsel as they might choose to employ to represent them; in short, that they should have a fair and impartial trial, with the presumption of innocence surrounding them as a shield at all stages of the proceedings, until their guilt should be established by competent and sufficient evidence."

Mr. Evarts, Sec. of State, to Aristarchi Bey, Dec. 8, 1877. MSS. Notes, Turkey.

Conviction and punishment of a citizen of the United States in a foreign country, in a trial conducted with palpable injustice and in violation of settled principles of law, will be the basis of a claim for redress from such country by the Government of the United States.

Mr. Evarts, Sec. of State, to Mr. Langston, Apr. 12, 1878. MSS. Inst., Hayti. See same to same, Dec. 23, 1878; Nov. 3, 1880; Mr. Davis, Asst. Sec., to Mr. Langston, Aug. 27, 1882.

As to defense of *res adjudicata*, see *supra*, §§ 238, 329*a*.

"I transmit herewith for your information a copy of a joint resolution passed during the late session of the United States Congress, and approved on the 15th ultimo, reciting certain allegations in relation to Edward O'M. Condon, whose case had heretofore been the subject of frequent correspondence with your legation, and requesting the President to cause an investigation to be made in the premises, and, if deemed expedient, to take such action as may secure to the prisoner an opportunity for exoneration or a speedy, fair, and impartial trial.

"It is not desired, pending such investigation, that you should take any further official action in behalf of Condon, but you may say informally to the British secretary of state for foreign affairs, that the Congress of the United States has ordered a careful examination of all the circumstances which led to the conviction of Condon, and that if the result of such investigation should tend to exonerate the prisoner from the crime of which he has been convicted, or should develop facts in his favor not known or presented at his former trial, the exculpatory proof will be

laid in due time before Her Majesty's Government, in the confident hope that a new trial, with adequate means of defense, will be accorded as an act of justice and equity."

Mr. Evarts, Sec. of State, to Mr. Welsh, July 1, 1878. MSS. Inst., Gr. Brit.; For. Rel., 1878.

"The Department's instruction No. 100, of the 1st instant, recited for your information the joint resolution of Congress of the 15th ultimo, in relation to the case of Edward O'M. Condon, and gave to you certain directions as to the course to be observed toward Her Majesty's Government with respect to the contemplated investigation. Subsequently, on proceeding to carry out the purpose of that resolution by providing for an impartial and discreet investigation into the circumstances attending the conviction of the prisoner with a view to ascertaining if any evidence is offered or obtainable which might justify an appeal for a new trial, it was deemed advisable to instruct you to defer action on that instruction, and the telegram of the 8th instant was accordingly sent to you.

"In execution of the request contained in the resolution, the Department, by the President's desire, has requested * * * to proceed to England without delay, in order to enter promptly upon the required investigation, and to omit no attention to the inquiry pointed out in the joint resolution which may promise beneficial results * * * has been instructed, however, before taking any steps in the direction of the proposed investigation, to report to you in order to obtain your needful counsel and co-operation in the delicate mission with which he is charged. * * *

"If the result of * * * 's investigation shall make it probable that full justice failed to be done to the prisoner on his conviction, and if, upon a candid statement of the proofs now accessible, it should be reasonably probable that the prisoner's innocence of the crime of which he was convicted could be shown, you will be put in possession by * * * of all the facts. Should you entertain the opinion that these facts bear the import which I have suggested, you will present them to the proper authorities for their consideration. This Government cannot doubt of the disposition of Her Majesty's Government to meet the case presented with the most favorable purposes in the prisoner's behalf that the facts laid before them will warrant. If, however, the result of the investigation should satisfy * * * and yourself that there is no fair support to the opinion that there was any failure of justice in the conviction, and that no new facts can be proved that would make Condon's innocence appear, the good offices of the Government will be directed to a renewed appeal to the clemency of the British Government.

"The President has every desire that the investigation shall result to the enlargement of the prisoner, and in any event shall satisfy him and his friends that every proper step has been taken in his behalf to

accomplish the purposes of the joint resolution of Congress. It is particularly advisable that nothing be done which might give the Government of Her Majesty even colorable grounds for regarding the action now taken as in any sense an interference in the domestic judicial administration of another state, the sole object being to discover, if possible, whether any presumption of innocence exists in favor of the prisoner, which, if he were a British subject, and the evidence in his behalf came through the usual channels of British law, might reasonably operate to secure him the relief contemplated."

Same to same, July 21, 1878; *ibid.*

"Your dispatches No. 849, of the 9th ultimo, and No. 850, of the 10th, have been read with attention. The first of these relates to the general question of extraordinary taxes, and the complaints preferred to you by American residents in Mexico against their exaction, while the second refers to the special case of the forced loan imposed on the late Walter Henry, and transmits the recent correspondence between yourself and Mr. Avila on that subject. Your note to the minister meets with the full approval of this Department. It is observed that the ground taken by Mr. Avila in regard to the recent decision of the supreme court of Mexico amply justifies the conclusions reached here in November last, and made the occasion of an instruction to you of the 22d of that month, which you have already acknowledged. The guarantees of the treaty securing to our citizens in Mexico the protection of the laws of that country cannot but be regarded as illusory and unsubstantial so long as those laws are ignored through the acts of subordinate military authorities, and the judgments of the highest tribunals of the land are unheeded.

"The situation is one which in the highest degree warrants and demands diplomatic intervention, the right to which is certainly not debarred by the unsatisfactory assurance that the wrongs of our citizens are shared in common with those of natives.

"The Department concurs in your belief that further discussion of the question of forced loans must be fruitless, unless the Mexican Government can give assurance of its willingness to take up the subject with a view to reaching an international agreement thereon."

Mr. F. W. Seward, Acting Sec. of State, to Mr. Foster, Jan. 15, 1879. MSS. Inst., Mex.; For. Rel., 1879.

As to inequality of taxation on aliens, see *supra*, § 204.

A law of the Argentine Republic which provides that unless the heirs of persons dying in that country appear and make claim to their estate, such estate will be confiscated, is such an unjust discrimination against citizens of the United States as to call for the urgent remonstrance of the Department of State.

Mr. Evarts, Sec. of State, to Mr. Osborn, Sept. 4, 1879. MSS. Inst., Arg. Rep.

"The state to which a foreigner belongs may interfere for his protection when he has received positive maltreatment, or when he has been denied ordinary justice in the foreign country, and the state of the foreigner may insist upon immediate reparation in the former case."

Mr. Evarts, Sec. of State, to Mr. Goodloe, Mar. 14, 1879. MSS. Inst., Belgium.

"Referring to my general instruction of the 26th ultimo (No. 166), in relation to the case of Michael P. Boyton, I now inclose to you a copy of a letter of the 30th of the same month from the Hon. Samuel J. Randall, in behalf of Mr. Joseph B. Walsh, a citizen of the United States, who, it appears, was arrested on the 3d of March last, under the provisions of the late act of Parliament, known as the 'protection act.' Mr. Walsh is represented as being imprisoned in Dublin, and it is probable that Kilmainham jail is the place of confinement. His relatives in this country, knowing only of his arrest and imprisonment, are unable to afford the Department any information as to the specific charge, if any, upon which he is held; and it seems quite likely that the prisoner himself is also in ignorance in regard to the particular offense for which he is thus subjected to summary detention and confinement.

"Mr. Walsh has been a citizen of the United States since 1875. His character as a law-abiding and good citizen is vouched for by well known and respectable citizens of Pennsylvania. I inclose a copy of his certificate of naturalization.

"I have already indicated to you in my instruction of the 26th of May, the entire absence of any disposition on the part of this Government to interfere with the administration of the local or general municipal laws of Great Britain. The laws of that country, and especially those that relate to the personal liberty and security of the citizen, have always been so much in harmony with the principles of jurisprudence cherished by Americans as a birthright, that they have never failed to command the respect of the Government and people of the United States. But whatever the necessity may be in the estimation of Her Majesty's Government for the existence and enforcement in Ireland of the exceptional legislative measures recently enacted in respect to that country, this Government cannot view with unconcern the application of the summary proceedings attendant upon the execution of these measures to naturalized citizens of the United States of Irish origin, whose business relations may render necessary their presence in Ireland or any other part of the United Kingdom, or whose filial instincts and love for kindred may have prompted them to revisit their native country.

"If American citizens while within British jurisdiction offend against British laws this Government will not seek to shield them from the legal consequences of their acts, but it must insist upon the application to their cases of those common principles of criminal jurisprudence which in the United States secure to every man who offends against its

laws, whether he be an American citizen or a foreign subject, those incidents to a criminal prosecution which afford the best safeguard to personal liberty and the strongest protection against oppression under the forms of law, which might otherwise be practiced through excessive zeal.

"That an accused person shall immediately upon arrest be informed of the specific crime or offense upon which he is held, and that he shall be afforded an opportunity for a speedy trial before an impartial court and jury, are essentials to every criminal prosecution, necessary alike to the protection of innocence and the ascertainment of guilt. You will lose no time in making the necessary inquiries into the cause of Mr. Walsh's arrest and detention, in which it is probable Mr. Barrows, the consul at Dublin, may be able to aid you. And if you shall find that the circumstances of the case, in the light of this and previous instructions, are such as to call for interference on the part of this Government, you will make such temperate but earnest representations as in your judgment will conduce to his speedy trial, or in case there is no specific charge against him, his prompt release from imprisonment."

Mr. Blaine, Sec. of State, to Mr. Lowell, June 2, 1881. MSS. Inst., Gr. Brit.; For. Rel., 1881. See *supra*, § 203.

"I have the honor to refer to my note to you of August 29, last, relative to the unfortunate condition of affairs existing on both sides of the border, and beg to invite your attention particularly to the circumstances of your complaint of the hanging of José Ordiña, a Mexican citizen, by certain residents of Arizona, for horse stealing, having recently received a letter upon that subject from Mr. John J. Gosper, acting governor of that Territory.

"In furtherance of the Department's request to ascertain the facts connected with the hanging of the individual referred to, Mr. Gosper called in person upon the Mexican consul at Tucson to obtain from him directly everything in relation to the deplorable circumstance.

"It appears that the only information the consul possessed upon the subject was derived, first, from a lady who wrote him at the time of the occurrence; and second, from Mr. Paul, the sheriff of Pima County, a copy of whose letter to the Mexican consul at Tucson accompanies your note of August 8, 1881.

"A personal interview was also had with Mr. Paul, who was requested to narrate all the facts as far as he was familiar with them. 'His statement to me, by word of mouth,' adds Mr. Gosper, 'was substantially as stated in his communication to the consul of Mexico, with the additional statement that the citizens of the Gila whose horses had been stolen were as certain that the two men whom they had captured were regular horse thieves as though they had been tried in court and regularly proven as such; that they did not intend to take the life of Ordiña, only intending to let him hang long enough to compel him to give infor-

mation of the whereabouts of the stolen animals, and by mistake let him hang too long.' Mr. Gosper states, also, that he learned from other credible sources that the two Mexicans adverted to as in part the subject of the Department's correspondence were, without doubt, habitual thieves.

"While admitting to the Mexican consul the illegal and unfortunate circumstance of the hanging of one of these men without due process of law, yet it appears from the acting governor's communication that the consul agreed with him that the two men in question were probably outlaws, and that even if the persons connected with the hanging of one of them were to be arraigned before a court of justice it was doubtful if there could be found a witness to appear before the magistrate to testify against them.

"The consul was assured by Mr. Gosper that in the event of further knowledge upon the subject coming to him he would promptly act in the interest of peace and the enforcement of the law.

"In this connection it seems not inappropriate to include, for your further information, two paragraphs from Mr. Gosper's letter to me upon the general subject of plunder and lawlessness on both sides of the border, believing, as I do, that, coming from such a source, they will not only serve to dispel all idea that the prevailing condition of things may be directly attributable to the acts of American citizens alone, but will suffice to convince you of the actual situation of affairs in that quarter, in which your own citizens are not infrequently prominently concerned.

"I quote from the letter of Mr. Gosper, who states as follows:

"While it is true Americans on our side of the line dividing the United States from Mexico are often guilty of murder and theft upon citizens of Mexico, it is equally true that Mexicans on their side of said line are equally guilty with Americans in the matter of murder and theft; and until recently, since the cow-boy combination along the borders for plunder, the crimes committed against the citizens of both the Governments of the United States and Mexico along the border were, in most part, committed by citizens of Mexico.

"While the local and general civil authorities of both Governments should be active and earnest in enforcing the laws, I think the civil authorities of the Government of Mexico are sometimes perhaps more sensitive over crimes committed by Americans than circumstances in particular cases would justify. Mere rumor and false statements often, for a time, create uneasiness which a knowledge of the facts quickly dispels.

"In conclusion, I beg to repeat what must be already known to you, that the Department has uniformly given to your several complaints in relation to the border difficulties every possible attention, and has sought upon each occasion the co-operation of the competent officers of this Government to remedy, as far as may lie in their power, the evils complained of. I shall do so in the present instance, in view of the statements contained in Mr. Gosper's letter; and in connection with the general subject of our border troubles, it gives me pleasure to inclose herewith for your information a copy of a letter from the Secretary

of War of the 1st instant, from which it appears that all proper assistance will be given by his Department to effect a better and more satisfactory condition of affairs in that section.

"I can confidently assure you of the desire of the general Government to suppress all unlawful disturbances and maintain a proper respect for law and order on the border, and that it will willingly pursue such means as may be found practicable to obtain that result."

Mr. Blaine, Sec. of State, to Mr. Zamacona, Nov. 10, 1881. MSS. Notes, Mex.; For. Rel., 1882. *Infra*, § 244.

"I have to acknowledge your No. 434, of the 30th August last, in relation to the arrest of Mr. Henry George.

"This Department was first informed of Mr. George's arrest by reports in the newspapers, and then telegraphed to you. Mr. George being in Great Britain, it was supposed he would communicate to you in writing the facts as to his arrest and thus afford you a basis for proper action. He however seems not to have written to you on the subject.

"After his release he had, it is understood, a personal interview with you, and the action thereupon promptly taken by you on the information you possessed is justified by the statements herein contained.

"His letter to the President, which at once appeared in the newspapers and was referred to this Department, contained the first detailed statement of the facts received here. As I understand that no similar communication has been made to you, I inclose a copy of the letter.

"Mr. George is a citizen of the United States and a gentleman well known in this country. He states that in October, 1881, he landed in Ireland, and since then he has traveled in Great Britain, always conducting himself in a lawful manner. On the 8th of August last, he started from Dublin for the west of Ireland, and on his arrival in the town of Loughrea, at about 6 o'clock in the evening, he was seized by the constabulary, carried to the police prison, where, in spite of his declaration that he was a citizen of the United States, traveling through the country without criminal intent or unlawful purpose, he was held a close prisoner for about three hours, during which time his baggage and person were searched and all his letters and papers minutely examined. Finally a magistrate arrived, who was informed by the subinspector that Mr. George had been arrested upon telegraphic information that he was a suspicious stranger; but Mr. George's request to be informed of the source of the information and the ground of suspicion was refused. The subinspector further stated that nothing suspicious had been found upon Mr. George's person or in his effects. He was thereupon discharged. Mr. George immediately protested in what appears to be proper terms against the treatment he had received, stating that he should have been given reasonable opportunity for clearing up any suspicion which might have been entertained of him before being arrested, imprisoned, and searched.

"On the following day Mr. George left Loughrea and proceeded to Athenry, a town but a few miles distant in the same county and within the jurisdiction of the same inspector and magistrate. There he remained one night, and the next morning, after having visited the antiquities of the place, was about to take the train for Galway, when he was again stopped by a subinspector of constabulary and questioned as to his name, nationality, business, from whence he had come, and whither he was going. To all these questions he gave true answers, showing him to be an American citizen of reputable character traveling upon lawful business. Nevertheless, he was not permitted to take the train, but was again placed under arrest, carried to the police barracks, and his clothing and baggage again searched in the same manner as at Loughrea, and this notwithstanding the fact that his arrest, search, and discharge at Loughrea were known to the constabulary at Athenry. Mr. George, who in the whole matter appears to have acted with discretion and within his rights, demanded to be promptly taken before a magistrate, but was detained a close prisoner until the arrival in the evening of the same magistrate before whom he was examined at Loughrea; yet even then he was not discharged until nearly midnight, and after again being subjected to a long examination.

"The President is persuaded that the acts so justly complained of must have been committed without authority by subordinate officials of the Government. But while the first arrest was an annoyance to which innocent travelers should not be subjected, and while the search and examination were not justifiable, and seem to have been conducted in a manner not consonant with the spirit of the laws both of Great Britain and the United States, it is particularly to the repetition of the indignity that the President wishes your attention to be directed.

"The second arrest occurred within forty-eight hours after the first; it was made within the same jurisdiction by officers conversant with what had occurred at Loughrea, who again searched his person and effects, and again forced Mr. George to undergo an examination, and that before the same magistrate who had interrogated him at Loughrea.

"These acts indicate an intention on the part of the officials to subject Mr. George to unnecessary personal annoyance.

"Nor can this action be excused by the fact that he is alleged to have visited the ruins of Athenry in company with the curate and another gentleman, or that he was seen to enter shops of alleged 'suspects.' The examination of Mr. George at Loughrea had presumably shown the object of his presence in Ireland, and should have convinced the authorities without an additional examination that his visit to the ruined abbey was one of curiosity, and that he entered the shops with the innocent purpose of making purchases.

"Mr. George's conduct in Athenry appears to have been natural to a traveler seeking information and amusement, and such as could not fairly subject him to suspicion. While citizens of the United States

traveling or resident abroad are subject to the reasonable laws of the country in which they may be sojourning, it is nevertheless their right to be spared such indignity and mortification as the conduct of the officers at Loughrea and Athenry seems to have visited upon Mr. George.

"This Government is loath to believe that the current rumors are true that the behavior of the officers and magistrate was prompted by a prejudice said to exist among the officials in Ireland against citizens of the United States.

"In Great Britain, as in the United States, it has been a governmental principle that the right of the individual to exemption from arrest or search without good reason, and without the observance of forms calculated to insure that right, should be jealously guarded, and when unfortunate events have demanded a temporary suspension or qualification of the right great care has been exerted to avoid injustice or unnecessary indignity.

"The power given to subordinate officials by the 'prevention-of-crime act' is so great and the rights subjected to their discretion are so important that foreign Governments may reasonably require that so far as their citizens, present in Ireland on legitimate and proper business, are concerned, the individuals selected to administer that act should be competent, well-informed, and unprejudiced. And should it appear that these officials have in the case of such foreign citizens misused the powers intrusted to them, they should be subjected to such condemnatory action, and the citizens wronged should receive such amends as the facts may warrant.

"The President regrets to observe that, so far as he has the facts before him, the officials at Loughrea and Athenry seem to have fallen far short of treating the rights of an innocent traveler with that respect which he cannot doubt Her Majesty's Government exacts of subordinate officials.

"It is not necessary now to comment upon the law under color of which these arrests were made.

"As you have already addressed a note to Lord Granville on this subject, a reply will probably soon be received by you. It is trusted that the tenor of that reply may prove satisfactory to this Government and also relieve Mr. George from any reproach the arrests are calculated unjustly to cast upon him. More definite instructions, therefore, than those herein contained and those heretofore received by you need not now be given."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, Oct. 3, 1882. MSS. Inst., Gr. Brit.; For. Rel., 1882. See *infra*, § 244.

"I have to call your attention to the question of the release of the estates in Cuba belonging to citizens of the United States, which have been heretofore embargoed or confiscated, and the release or return of which has been directed by the Government of Spain.

"The correspondence on this subject in your legation, extending over more than ten years, will give you full information as to the details of the matter and as to the position of the two Governments. It is not necessary, therefore, now to repeat the history of the occurrences in Cuba during the insurrection which led to the unusual and extreme action on the part of the Government of Spain of embargoing the estates of many residents of that island and of confiscating the estates of others, or of the subsequent negotiations. It is sufficient to say that when the orders touched the rights of American citizens, this Government promptly protested, and has never at any time recognized the legality of this action of the Spanish Government.

"In 1871 a commission was appointed by agreement between the foreign departments of the two Governments, which was to settle claims of the citizens of the United States against the Government of Spain for wrongs and injuries committed against their persons and property by the authorities of Spain in the Island of Cuba since the commencement of the insurrection. That commission soon assembled in Washington and claims were presented to it.

"For the purpose of the present instruction it is only necessary to notice the claims based upon an embargo or confiscation. These cases present three items of claims:

"1. For the release of the estates held by the Spanish Government.

"2. For the return of the rents and profits actually received by Spain during the detention of the property and admitted to be in the hands of that Government.

"3. Damages for the detention of the property.

"In many instances, the statement of the case presented by the claimants through this Government to the commission contained a demand for indemnity on all three of these grounds, and Admiral Polo, then minister of Spain in Washington, contended that the entire question raised by the embargo was within the jurisdiction of the commission, to be finally decided by that body. To this Mr. Fish did not assent, and said in his note to Admiral Polo, of May 22, 1872:

"I beg to point out to you that the claims before the commission are for compensation for past injuries, and that the applications for the release of the estates are properly subjects for diplomatic intervention.

"In another note to the Spanish minister, dated June 21, 1872, and referring to the case of Mrs. Farres de Mora, Mr. Fish said:

"It is the province of the commission to hear evidence on the claims of Mrs. de Mora for past injuries resulting from acts of the authorities in Cuba, and to award her pecuniary compensation if they shall find that she has suffered loss from that cause. The property which she now asks to have released is held under a summary order of the Government. An order of the Government can at once release it, and as no pecuniary claim can be preferred by the Government of Spain against her before the commission of arbitration, it is difficult to perceive why the release of her property should be made to depend on the final action of the commission.

"The position so taken by Mr. Fish has been consistently maintained by the United States, and while at first opposed by Spain, its validity was soon conceded.

"In 1873 (July 12) the Government of Spain published a decree admitting the illegality of the embargoes and confiscation and the justice of the position of the United States. In the preamble to this decree it is said:

"There cannot be found in international law any precept or principle authorizing this class of seizures, which bear upon their face the stamp of confiscation; neither under any sound judicial theory, is it admissible to proceed in such manner, nor can the exceptional state of war authorize under any pretext the adoption of preventive measures of such transcendent importance, and whose results, on the other hand, will inevitably be diametrically opposed to the purpose which inspired it.

"The decree directed the release of all estates embargoed by executive order in consequence of the decree of April 20, 1869, and the principles there set forth have been recognized repeatedly since that date through the action of the Spanish Government.

"The Government of the United States, in addition to the presentation of the general question of the release of the estates, has not failed to continually press upon the attention of Spain the individual cases which have from time to time come to its notice. Pursuant to our representations the minister of the colonies, on the 7th November, 1873, telegraphed to the governor-general at Havana:

"I salute your excellency, and reiterate compliance with the telegram of the 15th September, relating to the restoration, in obedience to treaties in force, of the property of North American foreigners; said restorations before the 30th November, in order to avoid international conflicts. The names of the citizens whose estates have to be restored in conformity to the decree of the 12th July are—

and here follows a list of some twenty-five names, among them those of individuals then, and some of them until January 1, 1883, claimants before the commission. Some of the estates have been released, but as to others the distinct directions contained in the decree and the telegram were not complied with.

"It is unnecessary to rehearse the long discussion which followed, and it is enough to say that the position of this Government has not changed, and no effort has been spared to secure the final and amicable adjustment which would have resulted from an enforcement of the decree of 1873 in the spirit in which it was made. Further, it may be observed, in order to show the consistent course of negotiation, that on February 9, 1876, orders were repeated by the Government at Madrid to restore the property of four American citizens, claimants before the commission, and at still later dates other similar orders were issued, and as late as 1879 the estates of de Rojas were restored to him pursuant to the continued representations of Mr. Evarts, de Rojas being at that time a claimant before the commission.

"The return of the revenues or proceeds of embargoed property, when actually collected by Spain, has always been regarded by both Governments as an incident to the release of the estates, leaving to the commission only jurisdiction over the amount of damage caused by the embargo or confiscation. On this ground Spain has paid to the claimants various sums of money.

"At no time is it found that the Spanish Government seriously contended for or that the United States admitted any judicial power in the commission to decide upon the original question of embargo and confiscation or restoration. The commission itself repeatedly held that it had no power to decree the restoration of property, or of the proceeds of property, or to enforce any opinion it might give in regard thereto. And such denial of jurisdiction, even though cases before the commission were discussed therefor, in nowise prejudiced the claimant's right to the executive redress which the commission could not give.

"Neither could the question of citizenship, as interpreted by the commission, affect the rights of American citizens to executive release from embargo for all purposes for the release of their property and the return of the proceeds. The citizenship of the claimants was admitted in the several supreme decrees ordering restoration, and on such purely executive ground our right to ask the execution of those decrees rests. As the commission had no power to weaken them, and still less set them aside by judgments contrary thereto, its want of jurisdiction as to such decrees was absolute, although they might be properly before it as *evidence* in cases where damages were claimed by reason of their non-execution.

"It is not necessary for me to remind you that while this Government has for many years urged diplomatically the release of the estates and the return of the collected revenues, it has at the same time demanded awards before the commission, as was observed in Admiral Polo's note to Mr. Fish of May 28, 1872. Most of the petitions before that body embraced, besides the claim for damages, a claim for the release of the estates and return of the proceeds collected, or suitable compensation in lieu thereof, but the fact that such claim was included in the petition to the commissioners was not regarded by either Government as a bar to diplomatic negotiation. The understanding of the two Governments on this point is clearly shown by the action of Spain in publishing the decree of 1873, and the subsequent orders, and in carrying out their provisions in various instances. In 1874 the estates of Joaquin Angarica were released, and a large sum of money was returned to him. Moses Taylor & Co. received their estates and nearly $100,000 of collected revenue, and the embargoed estates of de Rojas were restored in 1879. All of the persons thus relieved and others whom it is unnecessary to mention had claims before the commission. Of course, after the return of the estates and proceeds, only that part of the claims relating

to damages for detention remained before that body, and Angarica, Domingues, and Poey received an award on that item of their claims. In the case of Delgado the estates were returned by the Government of Spain, and by an oversight an award was also made by the commission in his favor. The claimant therefor was allowed to elect from the two remedies granted.

"A review of the correspondence, therefore, shows that this Government has maintained, and Spain has admitted, that the claims for the release of the embargoed property and proceeds were subjects for diplomatic discussion, and not properly within the jurisdiction of the commission; that the decree of July 12, 1873, and the orders subsequent thereto, provided for the unconditional release of the property seized; that the restitution of the property involves the restitution of the proceeds collected by Spain; that the commission was established to assess damages, and not to enforce restitution of the estates and proceeds.

"This brief allusion to the long-continued correspondence between the two Governments on this question is not made as a statement of any new principle, but to show that the course of this Government and Spain, in relation to this class of claims, has been harmonious and consistent.

"Reference has been made to the decisions of the commission to the effect that it had no jurisdiction as to the restoration of the property or proceeds thereof seized by the Cuban authorities, and also to the fact that while a number of the persons whose names were embraced in the several decrees of restoration were claimants before the commission, their appearance before that tribunal has in nowise affected their right to the restitution of their property and its proceeds. Now that the commission has completed its labors and its results are fully known, there would seem to be no further occasion for delay on the part of His Majesty's Government in complying with the repeated and urgent request of the Government of the United States for the complete restoration of the estates of its citizens, in accordance with the various decrees of the Spanish Government.

"While this Government is not disposed to press claims for the value of slaves seized by the Cuban authorities, it recognizes the injustice of permitting those authorities to enjoy the fruits of the seizure from the claimants, and the propriety of a voluntary compensation being made therefor. The question is one to be considered in the cases as they arise, and as to which further instructions will be sent you should there be occasion. One of the claimants has offered to surrender his claim for slaves provided the authorities stipulate to emancipate them, an offer which seems to be just and worthy of careful consideration.

"I have, therefore, to instruct you to bring the subject, with as little delay as possible, to the attention of the supreme Government at Mad-

d, and to present an urgent request for the enforcement of the decrees f release in all cases where the estates or their proceeds are still witheld by the officials in Cuba, notwithstanding the express and reiterted directions of the home Government to return the property to its ghtful owners. After so many years of diplomatic correspondence and epeated postponement in a matter wherein the rights of American laimants have been so completely recognized by the solemn decrees of ne Spanish Government, the President feels that he will not be disppointed in the expectation which he entertained that His Majesty's overnment will give the subject its earnest and prompt attention, with view to an early and complete compliance with the long unexecuted ecrees.

"The records of the legation contain detailed information as to the laimants still entitled to the benefits of the decrees alluded to, and you ill be furnished with such additional information in the possession of his Department as will enable you to submit to the minister of foreign ffairs an accurate statement of the property still claimed to be withheld by the Cuban authorities.

Mr. Frelinghuysen, Sec. of State, to Mr. Foster, May 3, 1883. MSS. Inst., Spain; For. Rel., 1883. See *infra*, § 244.

"Your dispatch No. 235, of the 19th ultimo, in relation to the arrest nd imprisonment of Dr. Maurice Pflaum, a citizen of the United States, t Axar, in Syria, has been received, and the subject, in connection ith the inclosures giving full details of the occurrence, carefully exmined. The affair, of which Dr. Pflaum so justly complains, appears o be frankly and impartially stated by that gentleman in his affidavit f the 26th of May, sworn to before W. E. Stevens, esq., the United tates consul at Smyrna, a copy of which accompanies Mr. Stevens' ispatch to Consul-General Heap, of the 11th of June, and, resting on his statement alone, the facts present a case of great hardship and of nusual and unwarranted severity on the part of the Turkish authoriies. But the matter does not rest alone on this unsupported statement. here is no attempt at denial of the material facts on the part of the ocal authorities at Axar, and the effort made by the local governor to stify these acts of annoyance and cruelty, as unnecessary as they ere unwarranted, is but an aggravation of the outrage.

"Your promptness in instituting an inquiry in regard to the matter most commendable, and your earnest and energetic demand for the ismissal of the governor of Axar and the payment to you of £2,000, urkish money, for the use of Dr. Pflaum and as indemnity for his njuries, meets with the approval of the Department.

"You will, therefore, press that demand in the name of this Governent, and urge its early and equitable adjustment."

Mr. Frelinghuysen, Sec. of State, to Mr. Wallace, July 27, 1883. MSS. Inst., Turkey; For. Rel., 1883.

Undue and needless delay in the trial of a citizen abroad is a ground for international intervention.

Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, Mar. 5, 1884. MSS. Inst., Mex.

"It is clear that if Mr. Van Bokkelen were a Haytian citizen, a simple assignment and proceedings in bankruptcy would suffice to release him; he being an alien, however, and so prohibited from holding real estate, Mr. Van Bokkelen cannot make the required assignment.

"Now, the Haytian law applicable to this case cannot require a man to do a specific thing and prohibit him the means of doing so. Hence, as Mr. Van Bokkelen suffers because he is an alien, the treaty between the United States and Hayti is clearly violated in his person."

Mr. Frelinghuysen, Sec. of State, to Mr. Langston, Feb. 2, 1885. MSS. Inst., Hayti.

"I have to acknowledge the receipt of Mr. Heap's No. 451, of November 1, 1884. It relates to the claim of Serkis Kurkdjian, an Ottoman subject, against the Rev. George C. Knapp, an American citizen, for the recovery of a dwelling-house in Bitlis, Armenia, which the latter purchased at a Government sale from an insolvent debtor's estate. Mr. Heap's dispatch presents the case fully, showing the measures taken by Mr. Knapp to retain possession of his property, the efforts of the Ottoman subject to despoil him of his rights, and the assistance rendered by your legation in behalf of the purchaser. For convenience I shall briefly recapitulate the main features of the complaint before proceeding to give the Department's conclusions respecting it.

"In 1859 Mr. Knapp bought the property, which was offered for sale by the Government authorities at Bitlis. As at that time foreigners were forbidden to hold real estate in Turkey, he complied with all the requirements of the law and obtained a full and complete title in the name of an Ottoman subject, father of the present complainant and former owner of the premises. In 1877 a law was enacted allowing foreigners to possess real estate. Thereupon Mr. Knapp had the title-deeds made out in his own name and delivered to him. In 1866, however, Serkis Kurkdjian sought to divest Mr. Knapp of his rights, and instituted proceedings to recover possession of the property. The case was successively called up in three different courts. In each the decision was adverse to the Ottoman subject and confirmed Mr. Knapp's title. The last contest was in the ecclesiastical court, the highest tribunal in matters of real estate in Turkey, and from whose decision there is no appeal. Notwithstanding all this, the complainant, about two years ago, succeeded in obtaining from the president of the court of first instance at Bitlis a decision declaring the sale illegal, and sentencing Mr. Knapp to restore the property and pay to Serkis Kurkjdian a considerable sum for rent, damages, and interest.

"It appears that Mr. Heap's efforts with the Sublime Porte in behalf of r. Knapp were without avail, for in a note to your legation of Novem- ɜr 18, 1884, the minister for foreign affairs confirms the order of the ʻesident of the court at Bitlis and requests Mr. Heap to have its order ɔeyed. Mr. Heap in his note to that ministry, in reply of November), 1884, protests against this action and submits the matter for the De- ɪrtment's consideration. I have accordingly given Mr. Heap's dispatch ɹreful attention. Mr. Knapp should continue the contest in the Turk- h courts to maintain his right to the property; otherwise he will be ɔmpelled, under the decision of the court at Bitlis and the order of the inister of foreign affairs, to evacuate the premises and deliver them ɔ. Still, if he thinks best to do this, Mr. Knapp has his remedy against ıe Government of Turkey for the amount of the purchase-money and r any expenses he may have necessarily incurred in defending his ghts.

"The court holds that the sale, in 1859, to Mr. Knapp by the authori- ɜs of Bitlis was illegal, and the minister for foreign affairs confirms this ew by his note of November 18, above mentioned. If the Ottoman overnment is willing to abide by such a decision it is not seen why Mr. napp should complain, insomuch as that Government is thereby com- ɨlled of necessity to make his advances and necessary expenses under e sale, good. That Government, too, in supporting the decision of the urt at Bitlis virtually admits its liability to Mr. Knapp, and is conse- ɪently estopped from setting any defense as against his just demands ıless there shall be found some condition in the sale of the property hich shall relieve it of such responsibility. Under these circumstances r. Knapp should vacate the premises as desired by the minister for reign affairs and immediately present his claim to the Government of ırkey for the purchase-money delivered to that Government, and also r any sums necessarily expended in the prosecution of his rights. If e property shall have advanced in value he is clearly entitled to the fference, whatever it may be. As he has had the use of the property has no just claim on account of the ordinary repairs placed upon it; ither has he a claim for interest on the investment. But he is unques- ɔnably entitled to reimbursement by the Government of Turkey for all ıounts he may have expended in the defense of his acquired title, in dition to his purchase-money. You will accordingly be governed by is instruction in further treating the matter."

Mr. Bayard, Sec. of State, to Mr. Wallace, Mar. 13, 1885. MSS. Inst. Turkey; For. Rel., 1885.

As to unequal taxation, see *supra*, § 204.

"I have to acknowledge the receipt of your No. 720, of the 4th instant which you inclose a copy of the decree of the supreme court of Hayti, irming the decision of the 'civil tribunal' in the matter of the ap- cation of Mr. C. A. Van Bokkelen to terminate his imprisonment on

a fair and full assignment of all his property for the benefit of his creditors.

"It appears that on a judgment being entered in the courts of Hayti against a party who is insolvent he is ordered by the court to imprisonment for a period fixed at the court's discretion.

"The severity of this process, however, is mitigated by the provision that by an assignment the insolvent, if there be no proof of fraud, is entitled to release.

"In other words, what exists in Hayti is imprisonment for debt, such imprisonment to terminate on a fair and full assignment of all the insolvent's property for the benefit of creditors. Hence, the right to enforce a debt by such imprisonment, and the right to have the imprisonment terminate by making a fair and full assignment, are rights reserved by law, the first to every creditor, the second to every debtor.

"The right to ward off imprisonment in this way is as much an everyday right of residents of Hayti as is the right to sue and enforce the suit by imprisonment. The right to terminate such an imprisonment by assignment is as much a part of the decree of imprisonment as is the imprisonment itself.

"In order to avail himself of this right, Mr. Van Bokkelen applied for leave to make the 'cession de biens,' presenting what may be called in our law a petition in bankruptcy.

"This appeal was made by him to the 'civil tribunal,' by whom it was rejected, not on the plea of fraud, which could be readily understood by this Government, and which could be sustained on the principles of international law, but on a plea not sustainable in international law; that while liability to imprisonment for debt attaches to foreigners as well as to Haytians, to Haytians alone and not to foreigners, belongs that privilege of release on assignment of assets, which the Haytian code makes an incident of the imprisonment.

"This decision was made on May 27, 1884, and from it Mr. Van Bokkelen entered an appeal to the court of cassation, the supreme court of Hayti.

"By this court a decree of affirmation was entered on the 26th ultimo. It is with no disrespect to the eminent judges by whom this opinion was given that I proceed to observe that not only is it irreconcilable with accepted principles of international law, but that it cannot be regarded as in any way defining the duties of Hayti as a sovereign state.

"The duties of the Haytian Government to the United States are not determined by Haytian legislation nor by Haytian judicial decisions, but by the law of nations. The opinion of the court of appeals of Hayti in no respect settles the international liabilities of Hayti.

"These liabilities, so far as concerns the United States, are determined by the principles of international law, as limited by the treaty stipulations, which form the supreme law of the land, both in Hayti and in the United States.

"The treaty of 1865, appealed to by the court, is first to be considered. The pertinent articles of that treaty are as follows:

"ART. VI. The citizens of each of the contracting parties shall be permitted to enter, sojourn, settle, and reside in all parts of the territories of the other, engage in business, hire and occupy warehouses, provided they submit to the laws, as well general as special, relative to the rights of traveling, residing, or trading. While they conform to the laws and regulations in force, they shall be at liberty to manage themselves their own business, subject to the jurisdiction of either party respectively, as well in respect to the consignment and sale of their goods as with respect to the loading, unloading, and sending off their vessels. They may also employ such agents or brokers as they may deem proper, it being distinctly understood that they are subject also to the same laws.

"The citizens of the contracting parties shall have free access to the tribunals of justice, in all cases to which they may be a party, on the same terms which are granted by the laws and usage of the country to native citizens, furnishing security in the cases required, for which purpose they may employ in the defense of their interests and rights such advocates, solicitors, attorneys, and other agents as they may think proper, agreeably to the laws and usages of the country.

"ART. IX. The citizens of each of the high contracting parties, within the jurisdiction of the other, shall have power to dispose of their personal property by sale, donation, testament, or otherwise, and their personal representatives, being citizens of the other contracting party, shall succeed to their personal property, whether by testament or *ab intestato*.

"They may take possession thereof, either by themselves or by others acting for them, at their pleasure, and dispose of the same, paying such duty only as the citizens of the country wherein the said personal property is situated shall be subject to pay in like cases. In the absence of a personal representative, the same care shall be taken of the property as by law would be taken of the property of a native in a similar case, while the lawful owner may take measures for securing it.

"If a question as to the rightful ownership of the property should arise among claimants, the same shall be determined by the judicial tribunals of the country in which it is situated.

"This Government contends that, for the reasons already given, Mr. Van Bokkelen is entitled not merely to have the same rights before the Haytian tribunals of justice and in Haytian process which he would have if he were a Haytian citizen, but that the term 'otherwise' in the ninth article enables him to dispose of his goods by means of a general assignment for the benefit of his creditors as freely as he could by 'sale, donation,' or 'testament.'

"It is further contended that as, by the law of Hayti, the right to the release of an imprisoned debtor after an assignment for the benefit of creditors is incident to imprisonment for debt when a Haytian is the defendant; so, under the treaty, it is an incident of imprisonment for debt when a citizen of the United States is the defendant.

"It is true that the treaty, in respect to citizens of the United States appealing to Haytian courts, contains the clause "furnishing security in the cases required.' This provision is familiar not only in international but in municipal law, and as to it I have to say (1), that it is, in both systems, understood to mean security for costs; and (2), that in Mr. Van Bokkelen's case there is no pretense that he was obliged to

'furnish security' in any case in which the term can be properly used.

"If, however, the opinion of the court of cassation may be understood to exhibit the position of the Haytian Government, it may be that the action of that Government in sustaining Mr. Van Bokkelen's detention is founded on a misapprehension which can be readily removed. The opinion says that 'there can be concluded from the terms of articles 6 and 9 of the treaty nothing which would authorize the opinion that this right could be invoked in the United States by a Haytian.'

"There is no jurisdiction in the United States in which the right of a Haytian to make an assignment of his entire estate for the benefit of his creditors does not rest on the same basis as that of a citizen of the United States; and there is no jurisdiction in the United States in which the right to discharge consequent upon such assignment would not belong to the Haytian on the same footing as to the citizens of the United States.

"If comity is the ground on which the Haytian Government rests, then, on the ground of comity, Mr. Van Bokkelen should be at once released, with such indemnity as is due to him from his imprisonment under this mistake of fact.

"The grievance to Mr. Van Bokkelen is serious. He has been confined, though in failing health, for quite a year, in a prison, and by this proceeding not only are his means of supporting himself and paying his creditors for the time destroyed, but his business, should he survive, has received a serious if not a fatal shock. But the injury to the commercial interests both of Hayti and of the United States is vastly more far reaching. No citizen of the United States will be hereafter willing to do business in Hayti, if, for indebtedness to which no taint of criminality is imputed, he is to be subjected to imprisonment so long and so oppressive as to involve the destruction of his means of livelihood as well as injury to his health and misery to his family. It is not to the interest of either Hayti or the United States that such a condition of things should exist.

"I forbear in this place to show in detail that by all civilized nations imprisonment for debt is now abolished. I forbear, also, to show what could be readily shown, that the *cessio bonorum*, with its incident of release from imprisonment, is now, by a principle accepted in modern international law, incident, as a matter of course, to all processes in which any insolvent debtor is under arrest in a case not involving a criminal offense. I forbear, also, to press the fact already noticed, that on principles of comity, as appealed to by the Haytian Government in this very case, there is no ground for Mr. Van Bokkelen's further detention, since in every jurisdiction in the United States the right to make an assignment for creditors, and the privilege of obtaining relief accruing thereby, belong to the foreigner as well as to the citizen.

"The release of Mr. Van Bokkelen is now asked on independent grounds. It is maintained, first, that continuous imprisonment for debt, when there is no criminal offense imputed, is contrary to what are now generally recognized principles of international law. It is maintained, secondly, that the imprisonment of Mr. Van Bokkelen is a contravention of articles 6 and 9 of the treaty of 1865 between the United States and the Republic of Hayti.

"The Haytian Government have a clear and ample opportunity to relieve this case from all difficulty by recognizing the error of their courts in supposing that the privilege of release of an imprisoned debtor would be denied to a Haytian citizen by the United States courts, upon making assignment of his property for the benefit of his creditors.

"You are now instructed to earnestly press the views of this Government, as outlined in this instruction, on the early attention of the Government of Hayti, by leaving a copy thereof with the minister of foreign affairs."

Mr. Bayard, Sec. of State, to Mr. Langston, Mar. 28, 1885. MSS. Inst., Hayti; For. Rel., 1885.

"In the examination of the correspondence on file in this Department in relation to the Haytian mission which you have made prior to setting out for your post, you have had an opportunity to acquaint yourself with the facts in the case of Mr. C. A. Van Bokkelen, a citizen of the United States now in prison for debt in Hayti under certain civil judgments rendered by the courts of that country. All the papers in the case will also be found of record in the legation at Port au Prince.

"It is unnecessary, therefore, to recite the facts of Mr. Van Bokkelen's case, or to refer to its merits, further than to say that, in the opinion of this Government, it presents a clear infraction of the rights of an American citizen under existing treaties between the two countries, by depriving him of his liberty and forbidding him certain legal resorts which a Haytian can employ in Hayti, and of which a Haytian, if the case were reversed, could not be deprived in the United States.

"The question being of Mr. Van Bokkelen's competency to make an assignment for the benefit of his creditors in order to take legal proceedings in bankruptcy, it is found that by one law of Hayti the security offered must be in real estate, and that by another law he, being an alien, cannot hold real estate. Hence he is compelled to possess what he cannot be permitted to possess, and in this dead-lock of conflicting laws he is subjected to treatment to which no Haytian could be subjected, and, in fine, a discrimination is enforced against him solely because he is a citizen of the United States.

"It is no defense to this statement to say that, under the laws of Hayti, he cannot be otherwise treated. That such a conflict between different laws can and does exist, is of itself a violation of those stipulations of existing treaties which guarantee to an American citizen in Hayti (as

to a Haytian in the United States) the same rights and resorts in proceedings at law as to native citizens of the respective countries. To close to an alien litigant some given channel of recourse open to a native without leaving open some equivalent recourse, is a denial of justice, and to base a persistent refusal to afford a remedy upon the letter of defective or conflicting laws is at once an admission of failure of justice, to the injury of the alien, and an attempt to justify by the mere fact of such evident failure a discriminatory course toward an alien prohibited by treaty and repugnant to public law.

"This Government is, from every point of view, in a position to insist on the substantial, if not identical, equivalence of treatment of Americans and Haytians before the Haytian courts.

"This case will demand your careful attention and action from the moment of your arrival at your post, and you will lose no opportunity to endeavor to impress the Haytian administration with the necessity of getting this matter out of the way of the desirable good relations of the two countries.

"You will not, without further instructions, present the matter in writing by way of remonstrance or appeal.

"This Government has twice of late made solemn and, as it believes, just representations invoking the sense of justice, of equity, and of treaty faith of the Haytian Government, and has been met by positive denial. In that direction it is not easy to see what more can be said.

"You will, however, in conversation with the minister for foreign affairs, take the ground that the Government of the United States regards the refusal to Mr. Van Bokkelen by the Haytian authorities of the right to make an assignment as a discrimination against citizens of the United States, which is in conflict with treaty; and that it will greatly conduce to the maintenance of friendly relations with the United States for the Haytian Government to see that Mr. Van Bokkelen is granted in substance all the privileges that would be granted to citizens of Hayti.

"You will say that it may become the duty of the President to lay before Congress any continued discrimination of this kind in defiance or repudiation of treaty duty.

"You will, however, forbear from making the release of Mr. Van Bokkelen a condition of diplomatic intercourse, or from declaring that a refusal to release will be followed by any other action by the Government of the United States than as above specified.

"You will, of course, bear in mind that this Government has no desire and can have no purpose to obtain for Mr. Van Bokkelen immunity from any just responsibility which may attach to him and which would, under like circumstances, attach to a Haytian citizen."

Mr. Bayard, Sec. of State, to Mr. Thompson, May 21, 1885. MSS. Inst., Hayti; For. Rel., 1885.

"I have to acknowledge with much satisfaction the receipt of Mr. angston's No. 741, announcing that on the 27th ultimo Mr. C. A. Van okkelen, confined for fifteen months as a debtor in the jail at Port au rince, was released.

"Mr. Langston observes that he has not formally presented the mat-er of indemnity to Mr. Van Bokkelen, but will give it prompt attention. ; is trusted that no step of this character has been taken without in-ruction from this Department.

"If any claim for indemnity be made here, it will receive due exam-ination on its merits. It is to be remembered that up to a certain point ie proceedings against Van Bokkelen, at the suit of Toplitz & Co., nd other citizens of the United States, whose debtor he was alleged to e, were perfectly regular under Haytian and general bankruptcy law. he debt was established and the insolvency of the debtor admitted. ; was only when Van Bokkelen was denied certain rights which a [aytian debtor would have under the insolvency act, that this Govern-ient claimed his treaty rights, as an American citizen, to be treated in ke manner as a Haytian, and be released from imprisonment for debt n making the same or an equivalent assignment as a Haytian debtor ould make. By releasing Van Bokkelen without the formality of an ssignment, and as would appear unconditionally, it may be found that [ayti has annulled the only security which Haytian law afforded for ie debt, and may so have inflicted injury on those citizens of the United tates at whose suit the judgment was obtained.

"These considerations make it needful that any claim for indemnity, om whatever source, should have the most careful scrutiny before re-eiving the sanction of this Government."

Mr. Bayard, Sec. of State, to Mr. Thompson, June 25, 1885. MSS. Inst., Hayti; For. Rel., 1885.

"I inclose, with a reference to instructions of the 25th and 26th ul-mo in the case, a copy of a letter from Mr. C. A. Van Bokkelen, who as released on the 27th May last (by what means does not appear) om confinement in the jail at Port au Prince, where he had been re-rained at the suit of Toplitz & Co. for debt, some fifteen months, in hich letter he intimates that, in view of the apparent success of Top-tz & Co. in securing their debt, which he assumes to be a fact, other irties will pursue a similar course. I also inclose a copy of a letter om the father, Mr. W. K. Van Bokkelen, of New York.

"I have informed both father and son of the date of the general in-ructions to you of June last on the subject.

"As you are aware, your instructions fully cover the question of se-uring to Van Bokkelen the treaty rights of procedure in the courts, hether as plaintiff or defendant, on the same footing as a citizen of ayti. If the situation created by the Toplitz suit is to be renewed at

the suit of other creditors, you will use your utmost exertions to have Mr. Van Bokkelen's treaty rights duly respected. But no claim for damages for imprisonment is to be presented by you without specific instructions of the Department."

Same to same, July 20, 1885; *ibid.*

"If Mr. Norwood's statement is exact in all particulars (and there is no cause for me to doubt the good faith of his narrative), his well-disposed efforts to adjust the question in a manner which shall reconcile his indisputable civil and religious rights under the Mexican constitution, with a considerate respect for the sentiments of the community in which he dwells, have been rendered unavailing by the concerted opposition of the Mexican authorities. This is a grave charge, and if those whose duty it is to administer the laws under the Mexican constitution and to protect all law-abiding persons in their individual, civil, and religious rights, do in reality render the fundamental guarantees of no avail, the matter might well be made the occasion for formal and urgent remonstrance. It is alike the duty of the Mexican Government to see that its laws are respected by and towards all persons within its jurisdiction, and the obligation of this Government to see to it that any American citizen whose rights are infringed without due warrant of law, shall be protected in those rights."

Mr. Bayard, Sec. of State, to Mr. Jackson, July 31, 1885. MSS. Inst., Mex.

"I herewith inclose a copy of a letter from Mr. C. A. Van Bokkelen, of the 19th ultimo, in reference to his illegal imprisonment at Port au Prince and his claim for damages in consequence thereof.

"In view of Mr. Van Bokkelen's present statement of facts and those already before your legation in regard to his case, I desire that you will call the attention of the Government of Hayti to his claim. There can be no doubt that Mr. Van Bokkelen was wrongfully imprisoned by the Haytian authorities and that great damage accrued to him thereby.

"Under these circumstances, therefore, you are directed to ask and to press for the redress claimed by Mr. Van Bokkelen, or, if the amount to be paid cannot be immediately agreed upon, for a reference of the question to an arbitrator, so that the case may be disposed of without unnecessary delay."

Mr. Bayard, Sec. of State, to Mr. Thompson, Oct, 2, 1885. MSS. Inst., Hayti; For. Rel., 1885.

Oppression of a citizen of the United States by a Mexican customs officer is a subject for diplomatic intervention; and the party injured is not confined to a judicial remedy.

Mr. Bayard, Sec. of State, to Mr. Jackson, July 20, 1885. MSS. Inst., Mex.

"I herewith inclose a copy of a letter from the secretary of the Board of Commissioners for Foreign Missions at Boston, Mass., of the 29th ultimo, and of my reply thereto of the 17th instant, in respect of the cause of American missionaries in the Ottoman Empire.

"It is not deemed necessary to dwell upon any particular cases, the record of which is in the legation at Constantinople, for it is assumed that you will have familiarized yourself therewith as one of the initial duties incumbent upon you. While from the nature of these cases the conduct of this class of questions must be largely intrusted to your discretion, yet it is not to be supposed that you will be any less active than your predecessors in endeavoring by every means known to the intercourse of sovereign states to secure all due protection and redress for your countrymen who take up their abode in Turkey and observe its laws.

"You will communicate freely with the Department on this subject as you may deem it necessary, and while giving your own views as to the result of the practical knowledge you may be able to obtain on the spot, you will ask such special instructions as you may think needful. You will rest assured that it is the purpose of this Government to go to all proper limits in protecting American rights and interests in Turkey, and any suggestions that you may offer as to the proper method of doing so will have careful consideration. At the same time you will not disguise from the Porte our sense of disappointment at the inadequacy of the protection accorded to law-abiding citizens of the United States in Turkey, and the bad impression which must be created from the continued failure to punish offenders whose identity has been amply established. The Turkish Government is no less concerned than ourselves in seeing to it that no imputation on its good faith shall be possible, and that no culprit shall be screened from the consequences of his acts. The Government of the United States recognizes in the missionaries an honest and worthy set of men who have achieved a vast amount of good and whose welfare is dear to multitudes in this country. They not only deserve all the protection possible, but should be shown every proper sympathy in their life-work."

Mr. Bayard, Sec. of State, to Mr. Cox, Aug. 17, 1885. MSS. Inst., Turkey; For. Rel., 1885. See App., vol. iii, § 68*a*.

As to protection of missionaries, see *supra*, § 54.

As to protection of citizens generally, see *supra*, § 189.

That in constitutional Governments the local judiciary must be primarily appealed to, see *infra*, § 241.

"I have to acknowledge the receipt of a dispatch from Mr. Wallace, No. 491, of April 9, 1885, reporting the adverse decision of the Government of Turkey to the claims for indemnity preferred by the United States on account of the assaults committed upon the Rev. G. C. Knapp and Dr. G. C. Reynolds and Maurice Pflanm, M. D.

"The minister for foreign affairs maintains that his Government is not to be held pecuniarily responsible for the acts complained of, and asserts that it is lawful for the parties interested to bring suit against the 'magistrates for prejudice to their cases by reason of irregularities in their proceedings.'

"I am unable to accept this reply as either a final or satisfactory answer. The magnitude of these offenses, no less than the cruelty which particularly characterized the treatment received by Messrs. Knapp and Reynolds, leaves no other course open to this Government than to again appeal to that sense of justice which should alike animate Turkey and prompt her to make honorable amends for these crimes.

"I do not, however, deem it necessary to review the entire correspondence in each of these cases, since it is fully before your legation. I therefore content myself with a brief reference in each case, and trust that you will speedily familiarize yourself therewith and renew the application for a money indemnity for these outraged American citizens. In so doing you will keep in mind the general views as to this class of claims expressed in my No. 9, of the 17th instant.

"The assault upon Messrs. Knapp and Reynolds was committed May 31, 1883, by Koords near Bitlis, and was accompanied with robbery and attempted murder. Dr. Reynolds received ten sword cuts, while Mr. Knapp was beaten over the head with a heavy club. Both gentlemen were tied, gagged, and dragged into the bushes and left to die.

"The case of Dr. Pflaum occurred also in 1883, April 28. It originated in an unpaid bill for medical services rendered to Tahir Effendi, of Axar, and involves the disputed Article IV of the treaty of 1830, with a peculiar advantage on the side of this Government. 'The governor of Axar,' says Mr. Wallace, 'did not confine himself to arresting Dr. Pflaum, and trying and sentencing him; he went the full figure, and punished him also.'

"It needs also to be remarked that in connection with these cases the Government of the United States has not yet succeeded in obtaining satisfactory treatment by Turkey.

"Mr. Wallace's dispatches, Nos. 460 and 461, of January 8 and 13, 1885, present the latest developments in the cases previous to his No. 491. His No. 460 contains a note from the Turkish Government relative to the case of Dr. Pflaum. It acknowledges the discovery of certain irregularities, announces the removal of two officials, and the reprimand of another. His No. 461 concerns the case of Messrs. Reynolds and Knapp. It also acknowledges the discovery of some irregularities, and states that certain officials have been 'put under judgment.'

"In the case of Dr. Pflaum, Mr. Frelinghuysen replied, under date of January 29, 1885 (No. 257), that in the Department's judgment it seemed fitting that this admission of irregular treatment should be fol-

lowed by an immediate offer on the part of the Sublime Porte to make due reparation to a wronged American citizen. Mr. Wallace was accordingly instructed to renew his application for a suitable money indemnity, should he not receive within a reasonable time an offer of settlement from Turkey. Respecting the complaint of Messrs. Reynolds and Knapp, my predecessor remarked in his instruction (No. 260) of February 4, 1885, that the reported action of Turkey was viewed with satisfaction as evidence of a desire on the part of that Government to recede from the dead-lock into which the matter had fallen through the action of the Turkish authorities, and of a purpose to act in accordance with international comity and right counsel. 'It remains to be seen, however,' adds Mr. Frelinghuysen, 'whether substantial justice for these injured men can be reached, and certainly no less will satisfy us. Under all the circumstances of this case, the Government of the United States rightly expects that the Government of Turkey will make early and due reparation to Messrs. Knapp and Reynolds for the outrages perpetrated by Moussa Bey, whose identity is beyond question.'

"So much depends on the tact with which a pecuniary claim on a foreign Government is pressed and on the influence of the officer presenting it, that I do not think that even two refusals from Turkey in the present cases should place this Government in a position in which a third application through a new minister would be improper.

"I cannot but think that these claims possess much merit, and that the Government of Turkey should be urged to settlement. I am not disposed to say that our insistence should be such as to disturb the friendly relations of the two countries, and with these remarks I feel that I may confidently leave the subject largely to your discretion."

Mr. Bayard, Sec. of State, to Mr. Cox, Aug. 17, 1885. MSS. Inst., Turkey; For. Rel., 1885.

For liability for denial of justice in case of collision in port, see Mr. Bayard, Sec. of State, to Mr. Scott, Sept. 3, 1885. MSS. Inst., Venez.; For. Rel., 1885.

"In short, while withholding a privilege may comport with the executive function, the imposition of a penalty is essentially a judicial function. Hence, in its dealings with Turkey, as with Russia, this Government cannot acquiesce in the executive imposition of a penalty, especially on account of race or creed. To the executive of another country all our citizens must be equal. If they, being voluntarily in a foreign land, contravene its municipal statute, it is for the law to ascertain and punish their offense."

Mr. Bayard, Sec. of State, to Mr. Cox, Nov. 28, 1885. MSS. Inst., Turkey. See same to same, Oct. 15, 1885. See for full instructions *supra*, § 171; and see also *supra*, § 55.

"When application is made to this Department for redress for the supposed injurious actions of a foreign judicial tribunal, such application can only be sustained on one of two grounds:

"(1) Undue discrimination against the petitioner as a citizen of the United States in breach of treaty obligations; or

"(2) Violation of those rules for the maintenance of justice in judicial inquiries which are sanctioned by international law.

"There is no proof presented in Captain Caleb's case establishing either of these conditions. It is true that it is alleged that there was a failure of justice, and were this Department, sitting as a court of error, it is not improbable that there are points in the proceedings complained of in the Mexican adjudication before us which might call for reversal. But this Department is not a tribunal for the revision of foreign courts of justice, and it has been uniformly held by us that mistakes of law or even of fact by such tribunals are not ground for our interposition unless they are in conflict, as above stated, either with treaty obligations to citizens of the United States or settled principles of international law in respect to the administration of justice."

Mr. Bayard, Sec. of State, to Mr. Morrow, Feb. 17, 1886. MSS. Dom. Let. *Infra*, § 230*a*.

"That the State to which a foreigner belongs may intervene for his protection when he has been denied ordinary justice in the foreign country, and also in case of a plain violation of the substance of natural justice, is a proposition universally recognized.

"One of the highest authorities on international law, Valin, says:

"'To render legitimate the use of reprisals, it is not at all necessary that the ruler against whom this remedy is to be employed, nor his subjects, should have used violence, nor made a seizure, nor used any other irregular attempt upon the property of the other nation or its subject; *it is enough that he has denied justice.*'

"If the Government of a foreign country refuses to execute its own laws as interpreted by its own courts, and to give effect to the decisions of its own courts, in respect of a foreigner, it denies justice.

"If the tribunals of a foreign State 'are *unable* or unwilling to entertain and adjudicate upon the grievances of a foreigner, the ground for interference is fairly laid.' (Phill., Int. Law.)

"In his recent work on the Law of Nations, Sir Travers Twiss, who holds a distinguished position as a writer on public law, says:

"'International justice may be denied in several ways: (1) By the refusal of a nation either to entertain the complaint at all, or to allow the right to be established before its tribunals; (2) or by studied delays and impediments, for which no good reason can be given, and which are in effect equivalent to a refusal; or (3) by an evidently unjust and partial decision.' (Law of Nations, by Sir Travers Twiss, part 1, p. 36.)"

Mr. Bayard, Sec. of State, to Mr. McLane, June 23, 1886. MSS. Inst., France. See, particularly, Cutting's case and other cases cited *supra*, § 189.

That judgments of prize courts of a captor's sovereign do not relieve him when such judgments are internationally wrong, see *infra*, §§ 238, 329*a*.

When there exists in the country of the alleged tort an independent judiciary as a co-ordinate power, such judiciary should be primarily appealed to.

Infra, § 241.

(2) BUT NOT MERE NATIONAL PECULIARITIES IN ADMINISTERING JUSTICE NOT VIOLATING INTERNATIONAL OBLIGATIONS.

§ 230*a*.

As to obedience to local laws due by resident aliens, see *supra*, § 206.
As to questions of protection of citizens in such relations, see *supra*, § 180.
As to submission to local judicial peculiarities, see *infra*, §§ 241, 242.

The mere fact that a citizen of the United States, when on trial for an offense in Austria, which he voluntarily visited, is forbidden, when under arrest, to have intercourse with his friends, is not ground for the diplomatic interposition of the United States.

Mr. Marcy, Sec. of State, to Mr. Jackson, Apr. 6, 1855. MSS. Inst., Austria.

Irregularities in the prosecution of a citizen of the United States in Chili, not amounting to a denial of justice or an undue discrimination against him as an alien, will not be ground for the interference of the Government of the United States.

Mr. Marcy, Sec. of State, to Mr. Starkweather, Aug. 24, 1855. MSS. Inst., Chili.

The right to suspend the writ of *habeas corpus* is one of municipal law to be declared to foreign Governments by the President through the Department of State; and it is not competent for foreign Governments to question the accuracy of such declarations.

Mr. Seward, Sec. of State, to Lord Lyons, Oct. 14, 1861. MSS. Notes, Gr. Brit. See 2 Halleck, Int. Law (Baker's ed.), 455.

The following report of a debate in the British House of Lords is given in the Diplomatic Correspondence of 1862, published by the Government of the United States, as appended to the President's message. After inquiries by the Earl of Carnavon, Earl Russell said:

"I conclude that the noble earl has hardly read the papers which have been laid upon the table of the house by command of Her Majesty; for the noble earl would there have found a correspondence between Lord Lyons and Mr. Seward, and also between Her Majesty's Government and Lord Lyons on this subject. The noble earl, in his statement, seems hardly to have taken into account the very critical circumstances in which the Government of the United States has been placed. In the spring of last year nine of the States in the scheme of confederation declared war against the Government of the United States. In such circumstances as these it is usual for all Governments to imprison upon suspicion persons who they consider are

taking part in the war against them. In a case which happened not many years ago, viz, 1848, when there was a conspiracy for the purpose of overturning the authority of Her Majesty, the secretary of state applied to the other house of Parliament for authority to arrest persons on suspicion, viz, for the suspension of the *habeas corpus* act, and in the papers presented to Parliament at that date there are two cases in which the lord lieutenant of Ireland had ordered the arrest of two American persons; a complaint was thereupon made by the American Government, and my noble friend (Lord Palmerston), at that time at the head of the foreign office, replied that with regard to those persons the lord lieutenant had due information, upon which he relied, that those persons were engaged in practices tending to subvert the authority of the Crown, and were aiding practices which were being pursued in that part of the Kingdom. Those persons were never brought to trial, but on that authority they were arrested. After this civil war broke out in America complaints were made by certain British subjects that they had been arrested upon suspicion. I immediately directed Lord Lyons to complain of that act as an act enforced by the sole authority of the President of the United States, and especially in regard to one of those persons there seemed very light grounds for suspicion, and I said he ought not to be detained. I am not here to vindicate the acts of the American Government for one or for any of those cases. Whether they had good grounds for suspicion, or whether they had light grounds for suspicion, it is not for me here to say. If I thought there were light grounds for suspicion, it was my business to represent that to the Government of the United States, but it is not my business to undertake their defense in this house. The American minister replied that the President had, by the Constitution, the right, in time of war or rebellion, to arrest persons upon suspicion, and to confine them in prison during his will and pleasure. This question has been much debated in America, and judges of high authority have declared that the writ of *habeas corpus* could not be suspended except by an act of Congress. But certain lawyers have written on both sides of the question; and I have recently received a pamphlet in which it is laid down that the meaning of the law of the United States is that the writ of *habeas corpus* can be suspended on the sole authority of the President of the United States. The question itself was brought before Congress, and a resolution was proposed that there should be no arbitrary arrests except with the sanction of Congress. But it was contended that it was part of the prerogative of the President; and a large majority decided that the question should not be discussed, and thereby left the President to act for himself. So much for the power given by the Constitution of the United States. With regard to the particular acts which the Secretary of State, under the sanction of the President, has authorized as to the arrest of British subjects, as well as American subjects, I am not here to defend those arrests, but I certainly do contend that it is an authority which must belong to some person in the Government, if they believe that persons are engaged in treasonable conspiracies, in the taking part as spies, or in furnishing arms against the Government. I believe that in regard to many of the cases of arbitrary authority that power was abused. I believe that, not only with regard to persons arrested, but in the course pursued, there was unnecessary suspicion, but I do not find that in any case there has been any refusal to allow British consuls at places where convenient to hear the cases of those persons, or when a statement was made by the British minister that Lord Lyons was slow in representing the case to Mr. Seward. Lord Lyons represented to me that these cases took up a very great part of his time, and he was anxious to investigate every one of them. Nor can I say that Mr. Seward has refused at any time to listen to those complaints. He has always stated that he had information upon which he could depend that these persons were engaged in treasonable practices against the Government of the United States. That being the question, the noble earl states, upon his own authority, that the arrests are illegal, and that the persons are kept in prison illegally. But that is more than I can venture to say. I can hardly venture to say that the President of the United

States has not the power, supposing persons are engaged in treasonable conspiracies against the authority of the Government, to keep them in prison without bringing them to trial, and it would require a strong denial of the authority of the law officers of the United States before I could presume to say that the President of the United States had not that power. With regard to the particular cases which the noble earl has referred to, I am unable to say whether or not some of those persons may not have been engaged in these conspiracies. We all know that during the time in which the United States have been divided there has been much sympathy shown in this country on one side and on the other—some have shown a strong sympathy for the North, and some for the South. (Hear, hear.) With regard to some of those cases, I have stated I thought the circumstances were such that it was quite evident that they had not been engaged in any conspiracy. There was one gentleman who happened to be a partner in a firm, and the other partners had great connections with the South. It was true that the firm had strong Southern sympathies, but the gentleman himself was a firm supporter of the Government of the Union. It was the mere circumstance of letters being sent to his partner which induced his arrest. I thought that a most arbitrary and unjust proceeding. (Hear.) Mr. Seward said he thought the circumstances were enough to induce suspicion, but that as soon as it was ascertained that there was no ground for that suspicion that gentleman was released. An innocent person being arrested and confined for several days in prison was undoubtedly a great grievance, and one for which he was entitled to compensation; but beyond the right to complain, and beyond the constant remonstrances of Lord Lyons, the British minister, in every such case, I do not hold that the circumstances warrant further interference. I believe the gentleman to whom I allude had stated that he expected his own friends would procure his release. The noble lord mentioned three cases. I was not aware of the cases the noble earl would mention. But with regard to Mr. Green, this is the statement he made on the 5th of September: 'I desire no action to be taken by my friends in England in consequence of my arrest. Lord Lyons has represented my case, and it will receive investigation in due time. Meanwhile I am in the hands of the officers of this fort.' There have been other cases of arrest and imprisonment under circumstances involving considerable hardship. There have been many cases of arbitrary imprisonment without trial, and these cases of arbitrary imprisonment have taken place under a Government which is engaged in a civil war, perhaps one of the most serious and formidable in which any country was ever engaged. Right or wrong, it is not for us to decide, but we must admit that all the means that have been used by civilized nations in warfare against each other are open to the Americans in this case. With respect to the particular cases, I believe that to whatever cause it may be owing, whether owing to the novelty of the case in North America, or to the inexperience of persons who are not conversant with the carrying out of affairs, or whether it is this, that arbitrary power can never be safely intrusted to any one without being abused, to whatever cause it is owing, I believe there will ever be many cases of abuse of such power. (Hear, hear.) But in every case where a British subject is arrested, and a reasonable case is made out for him, I shall be ready to instruct Lord Lyons to bring the case under the consideration of the Government of the United States. Lord Lyons has never been wanting in his duty. (Hear, hear.) He has, I think, shown himself a vigilant British minister in that respect, and I trust your lordships will not think that these cases have been neglected by the Government of this country. (Hear.)

The Earl of Derby. "The statement made by my noble friend behind me, and borne out by the noble earl opposite, is one which cannot be listened to without feelings excited in the highest degree in consequence of the treatment to which British subjects have been subjected. I am willing to admit, with the noble earl, that every allowance should be made for the circumstances and the difficulties in which the Government of the United States is placed, and the position in which they stand with regard to the civil war in which they are engaged; but I must say that the course

they have pursued with respect to British subjects in America, notwithstanding the remonstrances which have been, from time to time, presented to them by Lord Lyons in the performance of his duty, which he appears to have pursued with great prudence, is most trying to the patience of this nation. I think he was justified in using strong language with regard to the course which has been pursued. That course was anything but in accordance with the '*Civis Romanus sum*' doctrine of the noble lord at the head of the Government. (Laughter.) The noble earl opposite has apparently derived some advantage and instruction from the correspondence in which he was engaged with Mr. Seward, because in an early stage of those proceedings he very properly invoked against those proceedings the protection of the American law. He said that that which the law sanctions with regard to American subjects we could not complain of when applied to British subjects, but the question is this, does the law sanction it? The answer was that the Government did not consider themselves bound to take their view of American law from a British minister. Such was the substance of the courteous reply received by the noble earl. (Hear, hear.) There is one question which I must ask the noble earl to answer. It has already been asked by my noble friend behind me, but very conveniently the noble earl has not thought it necessary to reply to it. He states that the Congress has passed a resolution affirming the power of the President, under the Constitution, to suspend the *habeas corpus*.

Earl Russell. "With respect to the first point, what I stated, so far as I recollect, was this: That on a motion to the Congress with regard to the suspension of the *habeas corpus* by the President, the Congress, by passing to the order of the day, or laying the proposition on the table, or whatever their form is, voted by a small majority in favor of the proposition. I do not think we should complain if the President exercises that power, and the Congress does not interfere with it. With regard to the other cases which the noble earl has brought forward, I have no knowledge of them, or I would have taken pains to inquire into each of them. I certainly do not recollect the case of any person being called on to take the oath of allegiance to the United States, except one in which there was some question with Lord Lyons, and that was the case of a gentleman who had given notice of his intention to become a citizen of the United States. Now, a person wishing to become a citizen of the United States gives notice that at a certain time—within three months—he intends to ask leave to become a citizen of the United States. When the time arrives he must not only take an oath of allegiance to the United States, but he must forswear all other allegiance, more especially to Her Majesty Queen Victoria. (Laughter.) This gentleman who was arrested made an appeal to the British Government, and the answer of Mr. Seward to the remonstrance addressed to him was, 'This gentleman has renounced all allegiance, especially to Her Majesty Queen Victoria.' The matter was further inquired into, and it was found that Mr. Seward was wrong in his fact—(hear, hear)—that this gentleman had given notice that he intended to become a citizen of the United States, and to forswear all allegiance to Her Majesty, but he still remained a British subject. He had thus placed himself in a position in which he could not claim the protection of either one Government or the other. (Laughter.)"

A citizen of the United States who undertakes to conduct religious services in a foreign country, and who is interfered with therein by the authorities of such country, acting under its local laws, cannot obtain the intervention of this Government in his behalf unless it appear that he was unduly discriminated against.

Mr. Fish, Sec. of State, to Mr. Delaplaine, June 2, 1875. MSS. Inst., Austria. See Mr. Evarts to Mr. Kasson, Mar. 13, 1879; May 19, 1879; *ibid.*

As to protection of missionaries, see *supra*, § 54.

As to local allegiance, see *supra*, § 203.

As to limitations in such cases, see *infra*, §§ 241, 242.

When a suitor applies to foreign tribunals for justice, he must submit to the rules by which those tribunals are governed.

I Op., Bradford, 1794.

A person born in Ireland, but naturalized as a citizen of the United States, is not entitled, when arraigned in a British court for the offense of treason-felony, to the privilege of a jury *de medietate;* the reason being that as the right of trial by jury *de medietate* does not exist generally in the United States, we have no right to complain that an American citizen, indicted for crime in Great Britain, is not entitled to such privilege.

12 Op., 319, Stanbery, 1867. See *supra*, §§ 201 *ff.*

As will be hereafter seen, it will be a defense to an international claim that the claimant had the same rights allowed him as were allowed "subjects or citizens of the place of the alleged injury."

Infra, § 244.

VIII. *CONTRACTUAL CLAIMS.*

(1) Not ordinarily pressed.

§ 231.

"With regard to the contracts of an individual born in one country with the Government of another, most especially when the individual contracting is domiciliated in the country with whose Government he contracts, and formed the contract voluntarily, for his own private emolument and without the privity of the nation under whose protection he has been born, he has no claim whatsoever to call upon the Government of his nativity to espouse his claim, this Government having no right to compel that with which he voluntarily contracted to the performance of that contract."

Mr. J. Q. Adams, Sec. of State, to Mr. Salmon, Apr. 29, 1823. 5 Am. St. Pap., (For. Rel.) 403.

But the treaty with Spain of February 22, 1819, provided for the settlement of claims on contracts as well as claims on torts.

Mr. J. Q. Adams, Sec. of State, to Messrs. White *et al.*, Mar. 9, 1822. MSS. Dom. Let.

"Although a private citizen of the United States may have the right to enter into contracts with foreign Governments it is not allowed to a diplomatic representative to lend on such an occasion his official sanction without express instructions from the Department.

Mr. Forsyth, Sec. of State, to Mr. McAfee, Sept. 23, 1836. MSS. Inst., Colombia.

It is not usual for this Government to interfere except by its good offices for the prosecution of claims founded on contracts with foreign governments.

Mr. Calhoun, Sec. of State, to Mr. Crump, May 28, 1844. MSS. Inst., Chili. See, to same effect, Mr. Cass, Sec. of State, to Mr. Perry, Nov. 15, 1860, MSS. Dom. Let.; Mr. Seward, Sec. of State, to Mr. Culver, Oct. 3, 1863, MSS. Inst. Venez.; to Mr. Reid, July 17, 1868, MSS. Dom. Let.; to Mr. Conkling, Feb. 9, 1869, *ibid.;* Mr. Fish, Sec. of State, to Mr. Conkling, May 8, 1869, *ibid.;* to Mr. Creuse, May 25, 1869, *ibid.;* to Mr. Campbell, Jan. 4, 1870, *ibid.;* to Mr. Hanks, Mar. 16, 1870, *ibid.;* to Mr. Wilson, July 12, 1870, *ibid.;* to Mr. King, Dec. 9, 1870, *ibid.;* to Mr. Blow, Feb. 22, 1871, MSS. Inst., Brazil; to Mr. Folingsby, July 5, 1871, MSS. Dom. Let.; to Mr. Washburne, May 24, 1872, MSS. Inst., France; to Mr. Merrick, Jan. 22, 1873, MSS. Dom. Let.; to Mr. Cameron, Oct. 1, 1874, *ibid.;* to Mr. Rohan, Nov. 17, 1874, *ibid.;* to Mr. Beardsley, Nov. 21, 1874, May 18, 1875, MSS. Inst., Barb. Powers; to Mr. Remington, Aug. 2, 1876, MSS. Dom. Let.; to Mr. Sherman, Dec. 18, 1876, *ibid.;* Mr. Evarts, Sec. of State, to Mr. Seward, May 6, 1878, MSS. Inst., China; Mr. Frelinghuysen, Sec. of State, to Mr. Baker, June 27, 1882, MSS. Inst., Venez.; to Mr. Heap, Jan. 23, 1884, MSS. Inst., Turkey; Mr. Bayard, Sec. of State, to Mr. Scott, July 13, 1885, MSS. Inst., Venez.; to Mr. Sanders, July 23, 1885, MSS. Dom. Let.; to Mr. Seay, Feb. 20, 1886, MSS. Inst., Bolivia; to Mr. Hevner, Apr. 21, 1886, MSS. Dom. Let.

As to good offices as to guano contracts, see Mr. Marcy, Sec. of State, to Mr. Eames, June 20, 1855. MSS. Inst., Venez. *Infra,* § 311.

"The Government of the United States is not bound to interfere to secure the fulfillment of contracts made between their citizens and foreign Governments, it being presumed that before entering into such contracts the disposition and ability of the foreign power to perform its obligations was examined, and the risk of failure taken into consideration. In cases of personal hardship and loss, however, like the present, the Department does not decline forwarding a statement of the grievance, with a recommendation of the claim, to the friendly offices of the minister of the United States."

Mr. Marcy, Sec. of State, to Mr. Fowler, July 17, 1856. MSS. Dom. Let.

"If citizens of the United States combine with Ecuadorians and make a common investment of capital in local enterprises in Ecuador, so as to secure favors from the Government of Ecuador, they cannot, when disappointed, complain that the Government of Ecuador does not promptly discriminate in favor of their own national privileges as Americans, which they have thus compromitted."

Mr. Seward, Sec. of State, to Mr. Hassaurck, Sept. 12, 1865. MSS. Inst., Ecuador.

"The people who go to these regions (South America) and encounter great risks in the hope of great rewards must be regarded as taking all the circumstances into consideration, and cannot with reason ask their Government to complain that they stand on a common footing with native subjects in respect to the alleged wants of an able, prompt, and

conscientious judiciary. We cannot undertake to supervise the arrangements of the whole world for litigation, because American citizens voluntarily expose themselves to be concerned in their deficiencies."

Mr. Soward, Sec. of State, to Mr. Burton, Apr. 27, 1866. MSS. Inst., Colombia.

This Government will refuse to intervene to press, by any means looking to force, contractual claims by citizens of the United States on foreign Governments, offering in such cases only its good offices; and these will be refused when the debt was of a speculative character, or when it was incurred to aid the debtor Government to make war on a country with which the United States was at peace.

Mr. Seward, Sec. of State, to Messrs. Leavitt & Co., May 6, 1868. MSS. Dom. Let.

"It has not been customary for this Department officially to interfere in behalf of citizens of the United States who may have entered into contracts with foreign Governments, which the latter may not have fulfilled. The Department has usually limited its interposition to authorizing the proper diplomatic agent of the Government abroad to use his personal good offices toward obtaining relief for the claimant. The reason for this policy is that claims based on contract are supposed to stand upon a very different footing from those which arise from injuries to person and property committed by the authorities of any foreign Government."

Mr. Fish, Sec. of State, to Mr. Bassett, June 27, 1870. MSS. Inst., Hayti.

"By adopting a foreigner, under any form of naturalization, as a citizen, this Government does not undertake the patronage of a claim which he may have upon the country of his original allegiance or upon any other Government. (See *supra*, § 215.) To admit that he can charge it with this burden would allow him to call upon a dozen Governments in succession, to each of which he might transfer his allegiance, to urge his claim. Under such a rule the Government supposed to be indebted could never know when the discussion of a claim would cease. All Governments are, therefore, interested in resisting such pretensions. I infer from the memorials of Mr. Vigil and of the legislature of New Mexico, that the claims to which you refer arose from contracts, express or implied, with the Mexican Government. Our long-settled policy and practice has been to decline the formal intervention of the Government except in cases of wrong and injury to person and property, such as the common law denominates *torts* and regards as inflicted by force, and not the results of voluntary engagements or contracts.

"In cases founded upon contract, the practice of this Government is to confine itself to allowing its minister to exert his friendly good offices in commending the claim to the equitable consideration of the debtor without committing his own Government to any ulterior proceedings."

Mr. Fish, Sec. of State, to Mr. Muller, May 16, 1871. MSS. Dom. Let.

"It is not the policy or the practice of this Department to interpose as a matter of right to press upon foreign Governments claims of its citizens growing out of the non-fulfillment of private contracts. It does not, however, withhold the exercise of the good offices of its representatives in countries where such claims originate, in manifest instances of injustice to citizens deserving its aid; and you are directed, therefore, in that sense to bring the matter before the minister for foreign affairs of Japan, with an expression of the strong hope on the part of this Government that ample justice may be done to the claimant.

"There is one consideration which inspires this Government with a deeper interest in cases of this description occurring in Japan than would be entertained concerning similar cases in some other countries, and that is, that those foreigners whose services have been engaged by that judicious Government to impart to its officers and people a knowledge of the arts and sciences as a means of perfecting that development which has been so auspiciously begun, may receive such prompt and ample fulfillment of the engagements made by the authorities employing them as will serve as an encouragement to others so employed or to be employed, and that thus they may labor with zeal and confidence, and that the national progress may be thereby accelerated and assured."

Mr. Fish, Sec. of State, to Mr. Shepard, Mar. 19, 1872. MSS. Inst., Japan. As to Japan, see *supra*, § 68.

"Citizens of the United States who take up their abode in a foreign country, and enter into contracts with the citizens or public authorities there, are presumed to make their engagements in accordance with, and subject to, the laws of the country where the obligations imposed by the contract are to be fulfilled, and are ordinarily remitted to the remedies afforded by those laws for the redress of grievances resulting from breaches or non-fulfillment of such contracts.

"Instances may sometimes occur in which there has been a denial or miscarriage of justice in the courts. In such cases the good offices of the Department may properly be invoked on behalf of the claimant. The claims now in question are not deemed to be of a character which calls for such interposition."

Mr. Fish, Sec. of State, to Mr. Wing, Dec. 9, 1873. MSS. Inst., Ecuador.

"The claimants in this case stand in the relation of parties to a contract into which they voluntarily entered with the Government of Brazil, against which they now seek indemnity for losses sustained, resulting, as it is said, from acts of that Government alleged to be in contravention of their contract. It is a well-established rule of this Government that in such cases the parties are remitted for the redress of injuries resulting from any breach or disregard of the contract to the laws of the country in which the agreement was entered into and where

it is to be performed. This rule, so far as known, is one generally recognized by other civilized powers."

Mr. Fish, Sec. of State, to Mr. Pratt, July 17, 1875. MSS. Dom. Let.

When, in cases of claims based on contract, only "good offices" of a diplomatic agent are interposed, such agent is directed "to investigate the subject, and if you shall find the facts to be as represented, you will seek an interview with the minister for foreign affairs and request such explanations as it may be in his power to afford."

Mr. Fish, Sec. of State, to Mr. Osborn, Mar. 4, 1876. MSS. Inst., Arg. Rep.

"This Government does not interfere diplomatically to enforce claims of actual citizens of the United States arising out of contracts voluntarily entered into by them. When a contract is made by them under such circumstances, the person is expected to have considered the ability and the readiness of the other party to carry out the contract. In this case particularly such instructions could not be issued."

Mr. Fish, Sec. of State, to Mr. Swann, May 4, 1876. MSS. Dom. Let.

"A breach of contract virtually entered into between a citizen of the United States and a foreign Government with which this Government holds diplomatic relations, is not regarded as ground for official interference on behalf of the citizen."

Mr. Evarts, Sec. of State, to Mr. Thomson, Sept. 12, 1878. MSS. Dom. Let.

"Whilst I am well aware that claims of this nature, arising out of contracts voluntarily entered into by the citizens of one country with the citizens or Government of another, cannot properly be made the subject of diplomatic intervention, the manifest equity of this demand has, nevertheless, impressed me with a confident belief that its presentation in this form to the Dominion Government, through the medium of your legation, will so appeal to the sense of justice of that Government as to secure for it early attention and just consideration."

Mr. Evarts, Sec. of State, to Sir E. Thornton, May 2, 1879. MSS. Notes, Gr. Brit.

The Government of the United States will insist on fair and impartial examination and adjudication by Hayti, without discrimination as to nationality, of a contractual claim by a citizen of the United States against Hayti.

Mr. Evarts, Sec. of State, to Mr. Langston, Dec. 13, 1879. MSS. Inst., Hayti. See *supra*, § 189.

"In regard to claims of that character [contracts], it is a rule of universal acceptance and practice that the person thus voluntarily entering into a contract with the Government of a foreign country or with the subjects or citizens of such foreign power, for any grievances he may have or losses he may suffer resulting from such contract, is

remitted to the laws of the country with whose Government or citizens the contract is entered into for redress."

Mr. Blaine, Sec. of State, to Mr. Logan, Mar. 22, 1881. MSS. Inst., Cent. Am. See, however, as taking a much more extended view, Mr. Blaine to Mr. Hurlbut, Aug. 4, 1881. MSS. Inst., Peru.

"It is no part of the duty of this Government to enforce such contracts [for business operations] or to recover damages resulting from their violation. Every contract is in general to be regulated by the laws of the country in which it is made. Natural justice, mutual convenience, and the practice of all civilized nations require that contracts, whenever enforced, should be regulated and interpreted according to the laws with reference to which they were made; otherwise the rights and liabilities of parties would entirely depend on the law of the country where the remedy might happen to be sought."

Mr. Frelinghuysen, Sec. of State, to Mr. Phelps, Dec. 6, 1884. MSS. Inst., Peru.

"It is not necessary to remind you that an appeal by one sovereign on behalf of a subject to obtain from another sovereign the payment of a debt alleged to be due such subject is the exercise of a very delicate and peculiar prerogative, which, by principles definitely settled in this Department, is placed under the following limitations.

"1. All that our Government undertakes, when the claim is merely contractual, is to interpose its good offices; in other words, to ask the attention of the foreign sovereign to the claim; and this is only done when the claim is one susceptible of strong and clear proof.

"2. If the sovereign appealed to denies the validity of the claim or refuses its payment, the matter drops, since it is not consistent with the dignity of the United States to press, after such a refusal or denial, a contractual claim for the repudiation of which there is by the law of nations no redress. * * *

"3. When the alleged debtor sovereign declares that his courts are open to the pursuit of the claim, this by itself is a ground for a refusal to interpose. Since the establishment of the Court of Claims, for instance, the Government of the United States remands all claims held abroad, as well as at home, to the action of that court, and declines to accept for its executive department cognizance of matters which by its own system it assigns to the judiciary.

"4. When this Department has been appealed to for diplomatic intervention of this class, and this intervention is refused, this refusal is regarded as final unless after-discovered evidence be presented which, under the ordinary rules applied by the courts in motions for a new trial, ought to change the result, or unless fraud be shown in the concoction of the decision."

Mr. Bayard, Sec. of State, to Mr. Bispham, June 24, 1885. MSS. Dom. Let.

"As a result of the Department's investigation, it is found that the claim of the memorialist belong to a class not ordinarily the subject of

international diplomatic presentation. There is no doubt that the Central American Company has rendered great services not only to Guatemala but to the commercial world, and no doubt, so far as can be judged from the papers under consideration, that the corporation has been treated by Guatemala with an ungenerous and unlawful hardship by which it has been subjected to great and unmerited losses. But at the same time it must be remembered that the corporation went of its own volition to Guatemala, knowing that it subjected itself and its property to the laws of that Republic, and that the liberal gains to be expected in such an enterprise were to be secured largely in consideration of the peculiar risks arising from the system of a country not only with an unsettled jurisprudence, but liable to frequent political convulsions. It is a great misfortune, not only to the corporation but to the numerous business interests with which it is connected, that the risks accepted by it in the present instance should terminate so disastrously. But they were necessarily contemplated by the corporation when it voluntarily went to Guatemala.

"The rule thus stated is not new. It has been applied in innumerable cases in this Department, many of great hardship. A contractual claim is held as a rule not to be the subject of diplomatic treatment. And this rule is applied with strictness to cases where the creditor voluntarily goes to the debtor country to conduct in that country an enterprise which is to be closely bound up with its landed and business interests. This Government would peremptorily repel any claim by an European sovereign to exercise international supervision over such of our railroad or business corporations in the United States as may be owned by such sovereign's subjects. The rule which this Government would thus decline to recognize it cannot with propriety propose to others. * * *

"The rule just stated does not, however, preclude our diplomatic representatives abroad from exercising their personal good offices, under the instructions of this Department, in recommending, to the Governments to which they are accredited, claimants who are considered by the Department to be just creditors of such Governments. It must, however, be understood in such cases by all parties that such good offices are not tendered officially."

Mr. Bayard, Sec. of State, to Mr. Dorsheimer, Jan. 25, 1866. MSS. Dom. Let. As to good offices, see *infra*, § 233.

"In respect of alleged contractual debts of foreign Governments to citizens of the United States, the rule is that, while this Government may interpose its good offices to invite payment (*infra*, § 233), if these offices be declined and the existence of the debt be denied, its interposition ceases. In the present case, payment of this claim was urged upon Peru by former Administrations, and its payment was absolutely refused on the ground that no contract of the character claimed had been made. Under these circumstances, this claim is not regarded as

one which this Government should further press directly upon Peru; and consequently it cannot now be urged indirectly upon Chili, who, in taking possession of the guano deposits in question under a treaty cession, did so with recognition of the liens thereon admitted by Peru to be valid."

Mr. Bayard, Sec. of State, to Mr. Cowie, June 15, 1885. MSS. Dom. Let.
Mr. Bayard, Sec. of State, to Mr. Christy, June 16, 1885; *ibid.*

(2) EXCEPTION WHERE DIPLOMACY IS THE ONLY METHOD OF REDRESS.

§ 232.

"In all civilized countries instruments of this description [charters] are considered as sacred, and the welfare of the public and the interests of the Government itself are deemed to depend upon their being so held. If the great public objects for which charters are granted and the private interests involved in them were liable to be sacrificed at the pleasure of the dominant authority, no authority in the state which might succeed it could expect to accomplish a public object by similar means. In a Government which has been so changeable as that of Mexico, it is particularly necessary for the public weal that duties undertaken to be performed by the grantees of a charter, instead of being strictly and harshly judged, should be viewed in a spirit of equity and even indulgence."

Mr. Webster, Sec. of State, to Mr. Letcher, Aug. 18, 1851. MSS. Inst., Mex.

"What the United States demand is, that in all cases where their citizens have entered into contracts with the proper Nicaraguan authorities, and questions have arisen or shall arise respecting the fidelity of their execution, no declaration of forfeiture, either past or to come, shall possess any binding force 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. Without some security of this kind, this Government will consider itself warranted, whenever a proper case arises, in interposing such means as it may think justifiable in behalf of its citizens who may have been or who may be injured by such unjust assumption of power."

Mr. Cass, Sec. of State, to Mr. Lamar, July 25, 1858. MSS. Inst., Am. St.
For an account of a debate in the British Parliament in 1849, in reference to reprisals for unpaid Spanish bonds, see *infra*, § 318.

In instructions by Lord John Russell to Sir C. Wyke, March 30, 1861 (Brit. St. Pap., 1861–'62, 238), is the following:

"You are aware that it has not been the custom of Her Majesty's Government, although they have always held themselves free to do so, to interfere authoritatively on behalf of those who have chosen to lend their money to foreign Governments, and the Mexican bondholders

have not been an exception to this rule. The constitutional Government, however, while established at Vera Cruz, under the Presidency of Señor Juarez, concluded with Captain Dunlop, two years ago, an arrangement by which it was stipulated that 25 per cent. of the customs receipts at Vera Cruz and Tampico should be assigned to the British bondholders, and 16 per cent. to the holders of convention bonds. That convention was confirmed and extended by the arrangement lately made by Captain Aldham. The claims of the bondholders, therefore, have acquired the character of an international obligation, and you should accordingly insist upon the punctual fulfillment of the obligations thus contracted."

Under these instructions Great Britain united with other creditor powers in an attack on Mexico to enforce payment of this indebtedness.

For the position taken by the United States at the time, see *supra*, § 58. The civil war then raging, the interposition by the Government of the United States was one only of protest.

When a Government does not hold itself amenable to judicial suit by foreign claimants on contracts made by it, this "may be held to form an exception to the general rule" as to contracts.

Mr. Evarts, Sec. of State, to Mr. Gibbs, Oct. 31, 1877. MSS. Inst., Peru.

"In regard to which [a contractual case] diplomatic interference is never put forth, except when there is a failure or denial of justice shown in connection with it; but even in these cases, where the claim presents peculiarly meritorious features, the Government will only make use of its good offices with a view to facilitating the efforts of the claimant to obtain an adjustment of his claim."

Mr. Frelinghuysen, Sec. of State, to Mr. Cuyler, June 27, 1882. MSS. Dom. Let.

The Government of the United States cannot but regard with grave anxiety the attempt of a foreign Government to compel by force the payment of mere contract debts due subjects of such Government by a South American state.

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, Mar. 30, 1883. MSS. Inst., Gr. Brit.

"There have been instances, however, in which our ministers have received instructions of the character proposed [to collect foreign bonds], to the extent of permitting them to accept payment from a foreign Government on account of the principal or interest of its obligations. Such permission, however, was preceded by the assumption that the foreign Government was ready and willing either to make the payment or to negotiate with its creditor in such connection, and where the intervention of a consular or diplomatic agent of the creditor's country was a convenience to both. Mr. W.'s proposition seems to be founded on a wholly different basis from either of these. It is, as understood, to invest the Government of the United States with the legal title to cer-

tain Russian bonds, on account of which no payments of any character appear to have been made for twenty-five years, in the expectation that this Government would by such assignment act as the party in interest (not as its creditor's advocate or trustee), and so obtain for itself more favorable terms for the liquidation of these securities than those to which other holders are subject."

Mr. Frelinghuysen, Sec. of State, to Mr. Hunt, Jan. 12, 1884. MSS. Inst., Russia.

"Your letters of December 31 and of the 9th instant, in relation to the collection of principal and interest of certain Russian bonds in your possession, have received attention.

"The instances to which allusion was made in my letter of the 27th ultimo, where the Department has authorized its representatives abroad to receive payments or accept settlements of the bonds of a foreign Government, have been when such Government was ready to deal with its creditor, and where the intervention of a consular or diplomatic agent of the creditor's country was a convenience to both.

"There are also cases, but not common enough to form a rule of action, where the bonds of one Government being wholly or largely held by the citizens of another, upon default thereof, the Government of which the creditors are citizens may endeavor by diplomatic remonstrance or negotiation to effect an international agreement between the two countries, prescribing time and manner of adjustment.

"Your proposition, however, seems to be founded on a wholly different basis from either of these. It is, as I understand it, to invest the Government of the United States with the legal title of certain Russian bonds, on account of which no payments of any character appear to have been made for twenty-five years, in the expectation that this Government would by such an assignment act as the party in interest (not as its creditor's advocate or trustee), and so obtain for itself more favorable terms for the liquidation of these securities than those to which other holders thereof are subject.

"Your proposition is contrary to international usage, and is, moreover, inexpedient to a degree which bars it from favorable consideration, inasmuch as this Government would not wish to make itself a preferred creditor over other of its own citizens or foreigners who may hold other portions of the same debt."

Mr. Frelinghuysen, Sec. of State, to Mr. Wright, Jan. 17, 1884. MSS. Dom. Let.

"The attitude of this Government with reference to the settlement of the Egyptian debt question has been one of friendly neutrality. At the time of the organization of the commission of liquidation in 1880, the United States maintained for a time an attitude of reserve, owing to the fact that acquiescence in the scheme pledged, or appeared to pledge, the Government to accept as binding upon any of the citizens of the United States whose interests might be involved, the action to be

thereafter taken by a commission in the composition or control of which the United States had no part. It appearing, however, that no interests of American citizens were then in fact to be submitted to the decisions of the commission, and animated simply by the desire that no action on our part should embarrass the Egyptian Government in making with the actual creditors such arrangements as might be acceptable to them, this Government, at the urgent wish of the Khedive's Government, instructed its representative at Cairo, on the 17th of July, 1880, to adhere to the plan of liquidation, if the Egyptian Government regarded such action as material to the success of the scheme. The Government of the United States thus concurred in the plan, without being positively interested therein, and simply to avoid embarrassing the friendly Government of the Khedive."

Mr. Porter, Acting Sec. of State, to Mr. Phelps, Sept. 16, 1885. MSS. Inst., Gr. Brit.

Mr. J. Q. Adams, Secretary of State, in instructions to Mr. Nelson, minister to Spain, April 28, 1823, took the ground that Spain alone was responsible for the debt due Mr. Meade.

MSS. Inst., Ministers. 5 Am. St. Pap. (For. Rel.), 417. *Infra*, § 248.

In Marten's Droit des gens, 299 (liv. 3, ch. 3), it is maintained that when "a state has recourse to violent financial operations tending to do away with inherent obligations to satisfy its indebtedness, the violation of property rights which results is sufficient to authorize other nations to take up in this respect the cause of their subjects, and to employ for their protection every means authorized by the law of nations."

(3) Tender of good offices.

§ 233.

"A minister is not only at liberty, but he is morally bound, to render all the good offices he can to other powers and their subjects consistently with the discharge of those principal responsibilities I have described. But it belongs to the state where the minister resides to decide in every case in what manner and in what degree such good offices shall be rendered, and, indeed, whether they shall be tolerated at all."

Mr. Seward, Sec. of State, to Mr. Corwin, Apr. 18, 1863. MSS. Inst., Mex.

Good offices, being in the nature of unofficial personal recommendation, are in this respect distinguishable from official intervention.

Mr. Fish, Sec. of State, to Mr. Curtin, Oct. 15, 1870. MSS. Inst., Russia. See instances *supra*, § 231.

"To a minister of your experience I need not point out the proper distinction between diplomatic good offices and personal advocacy. To extend all proper protection to American citizens and to secure for them in any interests they may have a respectful hearing before the

tribunals of the country to which you are accredited, and generally to aid them with information and advice, are among the imperative and grateful duties of a minister, duties which increase his usefulness and add to his respect, and duties which, I have no doubt, you will faithfully perform.

"To go beyond and assume the tone of advocacy, with its inevitable inference of personal interest and its possible suspicion of improper interest, will at once impair, if it does not utterly destroy, the acceptability and efficiency of a diplomatic representative."

Mr. Blaine, Sec. of State, to Mr. Hurlbut, Nov. 19, 1881. MSS. Inst., Peru.

For illustrations of good offices, see *supra*, §§ 231, 232; and see also Mr. Bayard, Sec. of State, to Mr. Jackson, July 28, 1885. MSS. Inst., Mex.

As to Beaumarchais's claim against the United States, see Am. St. Pap., (Claims) 314, 319, 334, 343, 433, 484, 490, 538, 563, 581, 859.

IX. *CLAIMS FOR REAL ESTATE.*

(1) TITLE TO BE SUED FOR AT SITUS.

§ 234.

Treaties as to alien holding real estate are considered *supra*, §§ 138, 150*a*, 163, 166.

"The rule is universal that every question involving the title to real estate, whether by descent or purchase, must be determined by the law of the country wherein such real estate is situated, and all remedies for injuries in respect thereof must be pursued by the party aggrieved before the duly constituted tribunals of such country."

Mr. Marcy, Sec. of State, to Mr. de Selding, Mar. 3, 1856. MSS. Dom. Let.

Diplomatic intervention will not be granted to secure rights to real estate. A citizen of one country, who buys and occupies land in another, "cannot require his native Government to interfere on the subject of the operation of municipal laws or the judgment of municipal tribunals upon his rights of immovable property in this foreign land."

2 Phill. Int. Law, 6; adopted by Mr. Fish, Sec. of State, in letter to Mr. Cone, Oct. 10, 1871. MSS. Dom. Let.

As to the precariousness of title of citizens of the United States in Turkey, see Mr. Fish's dispatch to legation at Constantinople, Mar. 14, 1872. MSS. Inst., Turkey; and Mr. Fish to Messrs. Thompson *et al.*, May 9, 1872, MSS. Dom. Let. See, also, *supra*, §§ 165, 172.

"If a citizen of the United States becomes the owner of real estate in a distant country, he cannot claim for himself greater privileges than those accorded to residents or subjects of the country in which the property is held."

Mr. Fish, Sec. of State, to Mr. Wilder, May 6, 1876. MSS. Dom. Let.

The purchaser of land in a foreign country, though he be a citizen of the United States, holds it subject to the local law as to title and conditions.

Mr. Evarts, Sec. of State, to Mr. G. F. Seward, May 6, 1878. MSS. Inst. China.

A Mexican statute discriminating against citizens of the United States and other aliens in respect to the capacity to hold real estate in Mexico is in conflict with the treaty of 1831.

Mr. Evarts, Sec. of State, to Mr. Foster, June 23, 1879. MSS. Inst., Mex. See *supra*, § 154.

As to Mexican legislation discriminating against citizens of the United States as to the holding of real estate, see letter of Mr. Frelinghuysen, Sec. of State, to Mr. Howe, Mar. 15, 1884. MSS. Dom. Let. And see, also, *supra*, §§ 58, 172 *ff.*

The courts of the *situs* are the proper tribunals in which the title to real estate can be determined, whether the claimant be a subject or a foreigner.

Mr. Frelinghuysen, Sec. of State, to Mr. Scruggs, Feb. 19, 1884. MSS. Inst., Colombia.

Claims of citizens of the United States in reference to real estate in a foreign country are ordinarily to be determined by the courts of such country.

Mr. Porter, Acting Sec. of State, to Mr. Hall, June 9, 1885. MSS. Inst., Cent. Am. See Mr. Bayard, Sec. of State, to Mr. Hall, June 16, 17, 1885; *ibid.*

But where there is a denial of justice or undue discrimination the Government of the United States may intervene.

Mr. Bayard, Sec. of State, to Mr. Hall, July 13, 1885; *ibid.*

A question of title to real estate, when one of law and fact, is "to be decided by the *lex rei sitæ*. The case is purely one for the Mexican judicial tribunals in the first instance, and cannot properly be taken out of their consideration by diplomatic intervention. It can only be removed from the courts by agreement between the parties."

A claimant in such case "must first exhaust his rights in the higher courts, and until a decision in the court of last resort shall have been rendered, which decision shall amount to a denial of justice, there is no ground on which to base a diplomatic complaint."

Mr. Bayard, Sec. of State, to Mr. Jackson, July 17, 1885. MSS. Inst., Mex.

"Every sovereign state prescribes for itself the terms and conditions upon which title to lands within its jurisdiction may be acquired and held. If Turkish law imposes a disability, as to the tenure of real property, upon a Turk who has become naturalized elsewhere without the previous consent of his Government, then the question would be one of subjection to municipal regulations of those who have voluntarily placed themselves thereunder in a matter over which those regulations have sovereign and exclusive control. And the Turkish Govern-

ment having the right to investigate the cases of persons applying as foreigners for the privilege of holding lands, or for any other personal privilege over which municipal laws have control, it would seem to have the right to demand of them such evidence as would enable it to ascertain whether the applicants labor under any disqualification, and, in event of their refusal to produce such evidence, to withhold the privilege sought.

"The important distinctions are, however, to be borne in mind between a municipal privilege and a personal right and between withholding such privilege and imposing of a penalty."

Mr. Bayard, Sec. of State, to Mr. Cox, Nov. 28, 1885. MSS. Inst., Turkey. See, for full instructions, *supra*, § 171.

The laws of the state in which land is situated control exclusively its descent, alienation, and transfer, and the effect and construction of instruments intended to convey it.

Brine *v.* Ins. Co., 96 U. S., 627.

The Government of the United States is not bound to indemnify a British subject for losses sustained, as a claimant of real estate, by the settlement of the boundary line between New York and New Hampshire. This would be so on general principles; but, besides, by the 9th article of the treaty with Great Britain of 1794, it is expressly stipulated that British subjects who hold lands in the United States shall hold them *in like manner as if they were natives.*

1 Op., 320, Wirt, 1819.

That title to land is determinable exclusively by the *lex rei sitæ*, see Whart. Confl. of Laws, §§ 273 *ff.* But this does not preclude diplomatic intervention when there is undue discrimination or denial of justice by the *judex rei sitæ.*

Supra, § 230; *infra*, §§ 241, 241*a*.

As to rights of foreigners to real estate in Mexico, see Consular Reports on Commercial Relations, 1883, No. 31, 688 *ff.*

(2) OTHERWISE AS TO TRESPASSES AND EVICTIONS.

§ 235.

These, when amounting to forcible deprivation of right without recourse to law, are the subjects of diplomatic intervention.

Supra, § 230, and cases there cited. And see App., vol. iii, § 235.

X. *CLAIMS BASED ON NEGLIGENCE.*

§ 235*a*.

As is elsewhere seen, negligence is the basis of claims against neutrals for non-compliance with neutrality duties.

Supra, § 227; *infra*, §§ 395 *ff.*

A foreign Government is liable for damages to personal property sustained by a consul of the United States, and in violation of his consulate, owing to the negligence of such Government.

Mr. Frelinghuysen, Sec. of State, to Mr. Mathews, Jan. 16, 1883. MSS. Inst., Barb. Powers. Same to same, Apr. 24, 1883; *ibid.*

The Government of a foreign state is liable not only for any injury done by it, or with its permission, to citizens of the United States or their property, but for any such injury which by the exercise of reasonable care it could have averted.

Report of Solicitor, Dept. of State, affirmed by Mr. Bayard, Sec. of State, to Mr. Scruggs, May 19, 1885. MSS. Inst., Colombia.

As to liability of home Government for negligence in presenting claim, see *infra*, § 248.

As to negligence of neutral by which belligerent is injured, see *supra*, § 227; *infra*, § 402.

XI. *LIABILITY FOR PRIOR GOVERNMENT.*

GOVERNMENTS LIABLE FOR THEIR PREDECESSORS' SPOLIATIONS.

§ 236.

The position of the Government of Louis XVIII, that it was not liable for Napoleon's spoliations, is refuted at length in Mr. Gallatin's dispatch to Mr. Monroe, January 20, 1817.

2 Gallatin's Writings, 22.

The payment by France of these spoliations was in subjection to the principle of such liability.

See *supra*, § 222; *infra*, §§ 315 *ff.*

The doctrine that "the present Government of France is not responsible for any of the injuries committed against the Americans by that of Bonaparte, is so contrary to the acknowledged law of nations, to the treaties of France with the allied powers, and to the uniform recognition of all the laws and acts of Bonaparte's Government in relation to French subjects and to the internal concerns of France, that it is not probable that it will be officially sustained."

Mr. Gallatin to Mr. Price, Feb. 11, 1824. 2 Gallatin's Writings, 278.

The defense to a diplomatic appeal for redress for spoliations that the wrong was done by a former sovereign who was a usurper, is "unfounded in any principle in the law of nations, and now universally abandoned, even by those powers on whom the responsibility for acts of past rulers bore the most heavily."

Message of President Jackson, 1835. Deb. 1st sess., 23d Cong., App., 3. *Infra*, § 318; *supra*, § 148*c*.

As to details of spoliations by France under Napoleon, and by the European Governments set up by him, see *supra*, § 228.

The same position was maintained in 1825 and afterwards as to Holland's liability for spoliations under King Louis.

Correspondence submitted by President Monroe, Feb. 15, 1825. House Doc. 402, 18th Cong., 2d sess. 5 Am. St. Pap. (For. Rel.), 596. *Supra*, § 152.

"Upon the dissolution of that confederacy (that of Colombia) its members became, and have been informed that we hold them, jointly and severally liable for our claims."

Mr. Forsyth, Sec. of State, to Mr. Semple, Feb. 13, 1839. MSS. Inst., Colombia.

An annexing or conquering state takes the state annexed or conquered subject to its burdens.

Supra, § 5.

Revolutions in a State do not affect its liability for prior treaty debts.

Supra, § 137.

XII. *DEFENSES.*

(1) PART PAYMENT.

§ 237.

As to final payment, see *infra*, § 245.

Such payment, when on account, only bars *pro tanto*, but the acceptance by claimants from the Government of a sum smaller than that claimed in full of their demand, without protest or objection, is a valid and binding compromise of the demand, and a bar to a suit therefor against the Government.

U. S. *v.* Child, 12 Wall., 232; U. S. *v.* Justice, 14 *ibid.*, 535.

(2) LIS PENDENS; ELECTION OF ANOTHER TRIBUNAL; RES ADJUDICATA.

§ 238.

As to decisions of arbitrations, see *supra*, § 221.

Where a claimant on a foreign country has, by the law of such country, "the choice of either the judicial or the administrative branch of the Government through which to seek relief," and selects the latter, this does not make the arbitrary decision of the latter against him final and conclusive.

Mr. Fish, Sec. of State, to Mr. Nelson, Jan. 2, 1873. MSS. Inst., Mex. See *infra*, §§ 241, 329*a*.

"The Constitution of the United States limits and defines the powers of the several branches of the Government, and it is not within the province of the executive to interfere by its action with cases pending in the courts. Such matters are within the cognizance and under the control of the judicial branch of the Government, subject to the rules established by law for the administration of justice."

Mr. Fish, Sec. of State, to Mr. Polode Bernabe, May 31, 1873. MSS. Notes, Spain.

A claim which the claimant has elected to present to Congress will not, while before Congress, be entertained by the Department of State.

Mr. Fish, Sec. of State, to Mr. Schlözer, Sept. 14, 1874. MSS. Notes, Germ.

A collusive or irregular judgment by a foreign court is no bar to diplomatic proceedings by the sovereign of the plaintiff against the sovereign of the court rendering the judgment.

Mr. Evarts, Sec. of State, to Mr. Foster, Apr. 19, 1879. MSS. Inst., Mex. *Infra*, § 329*a*.

A suit brought in Honduras courts by a citizen of the United States to recover estates in Honduras, must be left to the determination of the courts in which it is brought, unless a positive denial of justice be shown.

Mr. Frelinghuysen, Sec. of State, to Mr. Hall, June 18, 1882. MSS. Inst., Cent. Am. See, however, Mr. John Davis, Asst. Sec. of State, to Mr. Hall, Oct. 9, 1882. See *infra*, §§ 241, 242, 329*a*.

Prior rulings of the Department will not be reversed unless on strong proof of after-discovered evidence requiring a reversal of prior action, accompanied by proof that there were no laches on the claimant's part, or of fraudulent imposition.

Mr. Bayard, Sec. of State, to Mr. Bispham, June 24, 1885. MSS. Dom. Let.

"It is a settled practice of this Department that a decision of the Secretary, given deliberately on an issue specifically presented to him, will be considered as final, unless it is shown to have been produced by fraudulent misrepresentations, or made under a palpable mistake of fact or of law."

Mr. Bayard, Sec. of State, to Messrs. Coudert Bros., Oct. 7, 1885. MSS. Dom. Let.

But references to Department offices for settlement do not constitute cases of arbitrament and award so as to bind the parties interested and to convey final title.

Gordon *v.* U. S., 7 Wall., 123; cited *supra*, § 221.

"A sentence of condemnation pronounced by a court having jurisdiction is generally regarded as *prima facie* valid, and acts as a bar to a diplomatic claim on account of the transaction judicially determined, until it shall be shown that the court proceeded in such a manner, or was governed by such rules, as to make its action subversive of justice."

Mr. Porter, Asst. Sec. of State, to Mr. King, Feb. 27, 1886. MSS. Dom. Let.

"When a case has been adjudicated by the Department, such adjudication must be regarded as final, unless clearly shown to have been produced by fraud, or unless there be proof of such after-discovered evidence as would, had it been adduced on the hearing, have changed the result."

Mr. Bayard, Sec. of State, to Mr. West, Apr. 28, 1886; *ibid.*

The defense of *res adjudicata* does not apply to cases where the judgment set up is in violation of international law.

Infra, § 242.

As to *res adjudicata* in international awards, see *infra*, § 316; *supra*, § 221.

A reference of a claim by American citizens against a foreign sovereign to an umpire, who decides in favor of the foreign sovereign, does not preclude the injured parties from applying to Congress for relief.

Case of brig General Armstrong. *Supra*, § 227; *infra*, §§ 248, 399, 401.

In a controversy between the United States and a foreign sovereign as to boundary, the courts must follow the decision of that Department of the Government which is intrusted by the Constitution with the care of its foreign relations.

Foster *v.* Neilson, 2 Pet., 253.

Although it may have been a rule of an Executive Department to construe an act of Congress relating to claims in a particular manner, yet, when Congress has afterward expressed an opinion in conflict with that of the Department, such action of Congress has been considered as in the nature of a legislative interpretation, which, becoming courtesy to the legislative department requires the Executive to observe.

5 Op., 83, Johnson, 1849.

Where a citizen of the United States selects a foreign forum, this Government presumes that he will obtain his rights.

9 Op., 374, Black, 1859.

It is within the power of the head of an Executive Department to allow a claim which has been rejected by one of his predecessors, without new evidence. But the decision of the head of a Department ought only to be reversed on clear evidence of mistake or wrong.

10 Op., 56, Bates, 1861.

When one department of the Government has lawfully assumed jurisdiction of a particular case, any other co-ordinate department should decline to interfere with or assume to control its legitimate action. Hence, when the courts have acquired jurisdiction of a case of maritime capture the political department of the Government should postpone the consideration of questions concerning reclamation and indemnities until the judiciary has finally performed its functions in those cases.

11 Op., 117, Bates, 1864.

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.

12 Op., 2, Stanbery, 1866. *Infra*, § 396.

A decision made by a former head of Department, after having heard the parties in interest, and after careful and thorough consideration of the case, there being no allegation that any material fact can be shown which was not before him, or of fraud, should be regarded by his successor as final, and be left undisturbed.

13 Op., 387, Akerman, 1871.

The principle that the final decision of a matter before the head of a Department is binding upon his successor in the same Department, under certain well-defined exceptions, has been so frequently declared that it is now entitled to be regarded as a settled rule of administrative law.

13 Op., 456, Bristow, acting, 1871.

Where a claim was duly referred to the board of commissioners constituted under the convention with New Granada, of 1857, and submitted to an umpire authorized by that convention, who reported his award during the existence of the board, and payment was suspended at the Treasury by request of the Secretary of State, and the case was afterward referred, without the claimant's consent, to the commission constituted under the convention of 1864 with the United States of Colombia, as the representative of the late Republic of New Granada: it was held by the Attorney-General (Hoar) that by the submission of this claim to the latter commission, in the manner stated, the claimant was not divested of his rights against New Granada under the award of the umpire aforesaid.

13 Op., 19, Hoar, 1869.

The award not having been vacated, opened, or set aside during the life-time of the former commission, and the claimant having done nothing since to waive his rights thereunder, it was further ruled that such award should be treated by our Government as a valid and conclusive ascertainment of his claim against New Granada.

Ibid.

That a sovereign is as much bound to redress a wrong done by an erroneous decision of a court, even of admiralty, as by erroneous executive action, see *infra*, § 329*a*.

The executive and the judicial departments of the Government being co-ordinate powers, it follows that judicial decisions on questions of international law, while entitled to great respect, do not bind the Department as would rulings of a superior tribunal. In addition to other reasons for this position (see considerations stated in Whart. Com. Am. Law, § 391), the very fact that the judiciary applies municipal law, while the Department of State is bound to consider not merely municipal law, but the relations of the United States to foreign powers irrespective of municipal legislation or adjudication (*supra*, § 9; *infra*, § 329*a*), makes it necessary for the executive to act, in matters of international law, as a power independent of the judiciary. In accordance with this view the supremacy of the political departments of the Government has been acknowledged by the judiciary in respect to territo-

rial boundaries (*supra*, § 22) and to recognition of foreign Governments. (*Supra*, § 71.) The executive also is regarded by the judiciary as the final tribunal by whom is to be determined the question of the pressure of claims by citizens of the United States on foreign sovereigns. (*Supra*, § 220.) A construction of a treaty, also, by the courts of one of the contracting sovereigns can only have municipal operation; nor can such construction be set up, even by the sovereign by whose courts it is pronounced, as an authority when conducting negotiations with the other sovereign as to the meaning of the treaty. (*Supra*, §§ 9, 133, 139.) That meaning is a matter of international settlement. If the parties cannot agree in reference to it, it must be referred to arbitration or, as the last resort, to war. Nor can the judiciary control the actions of the executive in either the construction or the application of a treaty. (*Supra*, § 139.)

That a sovereign cannot protect himself by a decision of one of his prize courts, when such decision is in conflict with sound principles of international law, will be hereafter seen. (*Infra*, § 329*a*.) It is important to keep in mind in this connection the striking summary of Mr. Cushing, given April 11, 1866, to the Secretary of the Treasury, as indorsed by Sir T. Twiss in his Pamphlet on Continuous Voyages, that "whilst the political department of the American Government was engaged in the early part of the present century in combating the overstrained construction of the laws of maritime war, set up by the courts and publicists of England, not a few of the most exceptionable of these constructions were at the same time being transported, one by one, into the jurisprudence of the United States by the judicial department of its Government, *with a prevailing tendency* to *exaggerate the rights* of prize in the interests of the captors." Sir T. Twiss adds "that it would ill become an English jurist not to admit that the prize tribunals of the United States had ample justification, in the early part of the present century, in reciprocating the rigorous rules which Lord Stowall applied to the trade of neutrals during the wars of the French revolution, and which were traditions from the wars of the previous century." As a further illustration of this tendency may be cited the Springbok case, discussed *infra*, § 362. On this subject see, in general, Judge Cooper's opinion "on the effect of a sentence of a foreign court of admiralty;" edited and approved by Mr. A. J. Dallas, Philadelphia, 1810, and quoted *infra*, § 329*a*. As to finality of awards see App., vol. iii, § 238.

(3) Limitation.

§ 239.

There is no statue of limitation as to international claims, nor is there any presumption of payment or settlement from the lapse of twenty years. Governments are presumed to be always ready to do justice, and whether a claim be a day or a century old, so that it is well founded, every principle of natural equity, of sound morals, requires it to be paid.

Mr. Crallé, Acting Sec. of State, to Mr. Crump, Oct. 30, 1844. MSS. Inst., Chili. See App., vol. iii, § 239.

(4) Intermediate war or settlement.

§ 240.

The effect of a war, followed by a treaty of peace, is to extinguish such claims by the citizens of one of the belligerents against the Government of the other, as are not provided for by the treaty of peace.

War and subsequent peace extinguish prior treaty obligations not relating to sovereignty.

Supra, § 135; *infra*, §§ 303 *ff.*

The effect of the *quasi* war, in Mr. Adams's time, involving "measures of retaliation, such as the exclusion of her vessels and produce from our ports," in releasing spoliations prior to that period, is discussed in a dispatch from Mr. Gallatin, minister to France, to Mr. Monroe, October 14, 1816.

2 Gallatin's Writings, 14.

Claims by British subjects against the United States prior to the ratification of the treaty of Ghent, and not presented to the commission appointed under that treaty, are barred by the provision of such treaty requiring all prior claims to be laid before the commission, or to be "considered as finally settled, barred, and thenceforth inadmissible."

Mr. Seward, Sec. of State, to Mr. Stuart, July 8, 1862. MSS. Notes, Gr. Brit.

But it may be otherwise when by the treaty of submission there is no such reference, or when the claim is one not falling within the reference.

See *supra*, § 221, where the limits of international commissions are discussed; and see *supra*, § 238, as to plea of *res adjudicata* in such cases.

"The mere fact of war can never extinguish any claim. If, indeed, claims for indemnity be the professed ground of war, and peace be afterwards concluded without obtaining any acknowledgment of the right, such a peace may be construed to be a relinquishment of the right on the ground that the question has been put to the arbitration of the sword, and decided. But if a war be waged to enforce a disputed claim, and it be carried on till the adverse party admit the claim, and agree to provide for its payment, it would be strange indeed to hold that the claim itself was extinguished by the very war which had compelled its express recognition. Now, whatever we may call that state of things which existed between the United States and France from 1798 to 1800, it is evident that neither party contended or supposed that it had been such a state of things as had extinguished individual claims for indemnifications for illegal seizures and confiscations."

Mr. Webster's speech on French spoliations, 4 Webster's Works, 163.
As to French spoliations in this relation, see *infra*, § 248.

"Mr. Gallatin having been applied to in 1827, to advocate a claim for indemnity of an American citizen on the British Government arising out of the capture and condemnation of vessels and cargoes in 1809, and consequently prior to the war of 1812, wrote to the Secretary of State: 'You will perceive by the inclosed copy of the Treasury answer that this is one of the numerous cases of vessels condemned by the British courts either under illegal decrees or under false pretenses, and for which no indemnity was obtained by the treaty of peace. You may remember that at Ghent we made a kind of protocol for the purpose of preserving the rights of the United States and of their citizens, notwithstanding that omission. The claim may at any time be made, though certainly not with any expectation that it will be entertained by Great Britain. I am not aware that this has ever been done. However desirous to be useful to our citizens, I would not venture on a step of

this kind before the subject had been fully examined and the President had decided thereon.' (Mr. Gallatin to Mr. Clay, April 3, 1827, MSS.)"

Lawrence's Wheaton (ed. 1863), 878.

If a nation, during a war, conducts herself contrary to the law of nations, and no notice is taken of such conduct in the treaty of peace, it is thereby so far considered condoned as never afterward to be revived or to be a subject of complaint.

Ware *v.* Hylton, 3 Dall., 199, 230.

(5) NON-EXHAUSTION OF LOCAL JUDICIAL REMEDIES.

§ 241.

Injuries by belligerent and mob action are discussed under prior heads, §§ 224 *ff.*

When diplomatic intervention is asked to press payment for an injury sustained by a foreigner in this country, it is first to be considered "whether the party complaining has duly pursued the ordinary remedies provided by the laws, as was incumbent on him, before he would be entitled to appeal to the nation, and if he has, whether that degree of gross and palpable negligence has been done him by the national tribunals which would render the nation itself responsible for their conduct."

Mr. Jefferson, Sec. of State, to the Att'y Gen., Mar. 13, 1793. MSS. Dom. Let.

"The courts of justice exercise the sovereignty of this country in judiciary matters; are supreme in these, and liable neither to control nor to opposition from any other branch of the Government."

Mr. Jefferson, Sec. of State, to Mr. Genet, Sept. 9, 1793. MSS. Notes, For. Leg.; 4 Jeff. Works, 68.

"The rule by which all Governments conduct themselves in cases where injury has been done by individuals of one to individuals of the other Government is to leave the injured party to seek redress in the courts of the other. If that redress be finally denied, after due application to the courts, it then becomes a subject of national complaint."

Mr. Jefferson, Sec. of State, to Mr. King, Dec. 17, 1793. MSS. Dom. Let.

To give a foreign Government a claim against us for damages to its citizens or subjects by our failure in neutral duties "there must be some palpable *default* on the part of our Government."

Mr. Jefferson, Sec. of State, to the minister of Great Britain, Dec. 26, 1793. MSS. Notes, For. Leg.

Personal injuries inflicted on citizens of the United States when in Great Britain can be redressed only by appeal to the local courts; nor can the Government of the United States complain of failure of justice

in this respect if the trials were fair and the due course of justice was pursued.

Mr. Monroe, Sec. of State, to Mr. J. Q. Adams, Nov. 16, 1815. MSS. Inst., Ministers.

"The general rule is that foreigners are bound to apply to the tribunals of justice, if they are open, for redress of any grievance before they appeal for it to the Government of those tribunals;" and hence there can be no claim against the Government of the United States for injuries inflicted on the coast of Florida on two wrecked French vessels and their crews, unless the remedy of recourse to the civil tribunals has been exhausted.

Mr. Clay, Sec. of State, to Mr. de Mareuil, Mar. 28, 1827. MSS. Notes, For. Leg. See also *ibid.* for letter of Mr. Clay to Mr. Salazar, Dec. 22, 1827.

"It is not necessary to affirm that a Government is not responsible in any case to a foreign Government for an alleged erroneous judicial decision rendered to the prejudice of a subject of said foreign Government. But it may be safely asserted that this responsibility can only arise in a proceeding when the foreigner, being duly notified, shall have made a full and *bona fide*, though unavailing, defense, and, if necessary, shall have carried his case to the tribunal of last resort. If, after having made such defense and prosecuted such appeal, he shall have been unable to obtain justice, then, and then only, can a demand be with propriety made upon the Government."

Mr. Clay, Sec. of State, to Mr. Tacon, Feb. 5, 1828. MSS. Notes, For. Leg.

"Although a Government is bound to protect its citizens, and see that their injuries are redressed when justice is plainly refused to them by a foreign nation, yet this obligation always presupposes a resort, in the first instance, to the ordinary means of defense or reparation which are afforded in the country in which their rights are infringed, to which laws they have voluntarily subjected themselves by entering within the sphere of their operation, and by which they must consent to abide. It would be an unreasonable and oppressive burden upon the intercourse between nations that they should be compelled to investigate and determine, in the first instance, every personal offense committed by the citizens of the one against the other." (A case of a tort committed on the claimant by a mob in Cuba.)

Mr. McLane, Sec. of State, to Mr. B. J. Shain, May 28, 1834. MSS. Dom. Let.

When, in case of a tort inflicted by French authorities on an American vessel, the French ministry tenders "a remedy at law," "in the nature of an execution against the imperial treasury itself," "the course indicated by the minister must at all hazards be pursued before further diplomatic interference on the part of this Government could be exercised."

Mr. Forsyth, Sec. of State, to Mr. Saltonstall, June 13, 1840. MSS. Dom. Let.

A citizen of the United States, residing in Canada, whose property there situate has "been destroyed and pillaged by British troops," must first seek redress from the "tribunals of the country under whose laws he has settled;" and until this remedy has been exhausted he is not entitled to the intervention of the Department of State in his behalf.

Mr. Buchanan, Sec. of State, to Mr. Larrabee, Mar. 9, 1846. MSS. Dom. Let.

As to the maintenance of this position in respect to the New Orleans riot of 1851, see *supra*, § 226; in reference to the anti-Chinese riots of 1885, *supra*, § 67.

"It may be said that the claimants, according to the ordinary practice of the British courts, had a right of appeal to the lords of appeal, and that as they did not avail themselves of that right they must be presumed to have acquiesced in the decision of the admiralty court." * * * [To this] "it may be answered that the claimants had incurred great expense in the prosecution of their rights before the admiralty court and had not the means for carrying the case further in the form in which it was there presented."

Mr. Webster, Sec. of State, to Mr. Lawrence, Jan. 13, 1851. MSS. Inst., Gr. Brit.

Nor does this limitation apply when the point in issue has already been decided by the appellate court adversely to the claimant.

Ibid.

The Government of the United States cannot be held liable for injury done to a foreigner by a State court erroneously assuming jurisdiction over such foreigner to his detriment, unless proper steps had been taken for reversing the decision, and all legal redress had been exhausted. "No principle of law is better settled than that the acts of a court of limited jurisdiction exceeding its authority are not obligatory, and the person injured in consequence thereof can have redress against the court as well as the parties to the prosecution."

Mr. Marcy, Sec. of State, to Mr. Bertinatti, Dec. 1, 1856. MSS. Notes, Italy.

But this so far as concerns personal liability of judges for merely negligent error, or error not involving malicious conspiracy, is in conflict with the weight of authority. It must also be remembered that where a remedy of impeachment is provided no civil suit based on judicial action can be maintained. On the other hand, a Government is as liable for the action of its judicial department, in violation of international law, as it is for the action of its executive department in violation of international law.

Infra, § 241*a*.

The Department of State cannot take cognizance of claims which are cognizable by the judicial tribunals of the United States.

Mr. Seward, Sec. of State, to Lord Lyons, Jan. 12, 1863. MSS. Notes, Gr. Brit.

British subjects, personally injured in one of the States in this country, must seek redress through the tribunals of such State. Their case is not one for diplomatic intervention.

Mr. Seward, Sec. of State, to Mr. Dovens, May 23, 1865. MSS. Dom. Let.

The Department of State cannot give redress, in case of alleged action injurious to foreigners by inferior tribunals in the United States, until all means of legal revision or correction are exhausted.

Mr. Seward, Sec. of State, to Mr. Cerruti, July 7, 1868. MSS. Notes, Italy.

A claim against a foreign Government, based on misconduct of its domestic officials must be presented to the judicial department of such Government, when such a department is fairly organized and has jurisdiction of the case.

Mr. Fish, Sec. of State, to Mr. Ruger, Oct 21, 1869. MSS. Dom. Let.

By section 1068 of the Revised Statutes (being part of the statute organizing the Court of Claims) "aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction." Under the act of 22d July, 1868, from which this section is taken, there being proof of provision in Turkey for the prosecution of suits against the Government by citizens of the United States, the remedy of a Turkish subject for injuries alleged to have been inflicted on him by Government officials in Texas is in the Court of Claims.

Mr. Fish, Sec. of State, to Baltazzi Effendi, Feb. 8, 1871. MSS. Notes, Turkey.

"It is not within the province of the executive branch of this Government to interfere in any way with the proceedings of the judiciary in an action instituted by a private citizen," even though such a citizen be a consul for a foreign state.

Mr. Fish, Sec. of State, to Mr. Catacazy, June 13, 1871. MSS. Notes, Russia.

A claimant must exhaust his remedy before the local tribunals, when there are such, and when he is admitted to equal privileges in them, before he can claim diplomatic intervention.

Mr. Fish, Sec. of State, to Mr. Taylor, Oct. 20, 1871. MSS. Dom. Let.

"It is not, however, within the province or the usage of this Government to interfere in behalf of private citizens in their assertion or rights of private property situated in foreign nations. Such rights must be regulated and determined according to the laws of the country where the property may be situated.

"The consul of the United States at Warsaw is Mr. Charles de Hofman. Mr. Kulinski is at liberty to address him, requesting his good offices in his behalf, or whatever unofficial services he may be able and

willing to render. By inclosing this present letter in the original to the consul, that officer will perceive the view which is taken by the Department of the case; but the Department can have no responsibility in the premises, nor can the consul be expected to incur charges or fees other than such which he may be provided with funds to meet. Any letter to the consul, if desired, may be sent to this Department for transmission to him.

Mr. Hale, Asst. Sec. of State, to Mr. Kalussowski, May 8, 1872. MSS. Dom. Let.

A claimant in a foreign state is not required to exhaust justice in such state, when there is there no justice to exhaust.

Mr. Fish, Sec. of State, to Mr. Pile, May 29, 1873. MSS. Inst., Venez.

"When the matter is properly within the jurisdiction of the courts of a foreign Government, the Government of the United States does not interfere, except when, after a diligent prosecution of all the remedies which the law of the country affords, it turns out that there has been a denial of justice to the party invoking its aid."

Mr. Davis, Asst. Sec. of State, to Mr. Moseby, June 23, 1873. MSS. Dom. Let.

Questions properly belonging to the judiciary of a country on whom a claim is made should be submitted to such judiciary, and should not be made the subject of diplomatic interference, unless it should appear that the judicial remedy was refused or perverted.

Mr. Fish, Sec. of State, to Mr. Pratt, Mar. 20, 1875. MSS. Dom. Let.
Mr. Fish to Mr. Warren, Feb. 17, 1875; *ibid.*

If, by the laws of Mexico, it is made essential that the facts on which a claim against her is based "should be first investigated by the ministry of war and marine, it is conceived that the subject should be referred to that department by the minister of foreign affairs; such would be the course pursued by this Government were a similar demand to be made on it by that of Mexico."

Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, Nov. 15, 1883. MSS. Inst., Mex.

"I have had the honor to receive your note of the 28th April last, and have given due consideration to the request therein presented that the pending claim of Mr. J. P. Tunstall, a British subject, for indemnity from the Government of the United States by reason of the murder of his son, John H. Tunstall, in 1878, in the Territory of New Mexico, should have examination and decision at my hands.

"The facts of the case, and the assumed merits thereof, on which Her Majesty's Government bases its expectation that the claim of Mr. J. P. Tunstall will be recognized by the Government of the United States, are so fully set forth in the correspondence exchanged between this De-

partment and your legation since March 9, 1878, the date of Sir Edward Thornton's note first presenting the subject, that a very brief summary will suffice for my present purpose.

"John H. Tunstall, a British subject, domiciled in Lincoln County, in the Territory of New Mexico, where he carried on business as a ranch proprietor, is alleged to have been the partner of one Alexander A. McSween, against whose property writs of attachment had issued in a local suit. The sheriff of Lincoln County, Mr. Brady, sent his deputy sheriff, Mr. Matthews, to Mr. Tunstall's ranch to attach certain stock and horses there as coming under the decree of the court. Mr. Tunstall appears to have admitted the service of the writ, and informed the deputy sheriff that he could attach the stock and leave a person in charge thereof until the courts should adjudicate the ownership as between Mr. McSween and Mr. Tunstall. The deputy sheriff did not in fact then attach the property found at Mr. Tunstall's ranch, and departed, as would appear, for the purpose of assembling a numerous posse, with which he returned to the ranch. Mr. Tunstall meanwhile had collected the stock and horses and with them quitted the ranch, going in the direction of the county-town, Lincoln. The deputy sheriff deputized one W. Morton, with eighteen men of the posse, to follow Mr. Tunstall, with orders to seize the horses. After a pursuit of some 30 miles, Morton and his party overtook Mr. Tunstall and the horses. What then occurred has not been developed by judicial proofs, but it is alleged on the part of Her Majesty's Government that Morton's party opened fire, that Mr. Tunstall abandoned the horses and sought safety in flight, and that he fell when he had ridden about 100 yards away, shot by two bullets in the head and breast.

"It is stated by a special agent of the Department of Justice who investigated the case 'that Morton, Jesse Evans, and Hill were the only persons who saw the shooting, and that two of these three persons murdered him' [Tunstall]. Of these persons, Morton and Hill were afterwards killed, and there is no knowledge that the survivor, Jesse Evans, has been brought to justice for his complicity in the murder of Mr. Tunstall.

"Upon this statement of facts, for which we are dependent in great part on the report of the special agent of the Department of Justice, who further alleges that the members of the pursuing party were at personal enmity with Mr. Tunstall, Her Majesty's Government claims, in brief, that the sheriff of Lincoln County, New Mexico, acting through his deputy, and he in turn through the subdeputized leader of the pursuing party, Morton, is accountable for a murder committed in the execution of a process of law, and that the father of the murdered man, having a pecuniary interest in the life of his son, based on the business operations carried on by him, has a right to recover indemnity from the Government of the United States, whose agent the sheriff is asserted

to have been. The actual presentment of this claim for indemnity is thus made in Sir Edward Thornton's note of June 23, 1880.

"It appears that Mr. J. P. Tunstall has it not in his power to recover damages from the Territorial Government of New Mexico by proceedings at law or otherwise. A citizen of the United States would in a similar case probably appeal to Congress; but this remedy is not open to an alien. Earl Granville has therefore instructed me to present to the Government of the United States a claim on behalf of the father, Mr. J. P. Tunstall, for such compensation as upon examination of the injury and losses sustained may be found to meet the justice of the case.

"It seems unnecessary, in this review of the facts, to summarize the allegations upon which much of the correspondence hinges, that Mr. Tunstall, by his honest and fearless course in New Mexico, during his domicil there, had incurred the enmity of Sheriff Brady and of men who were joined to the posse which pursued and murdered him, and that the sheriff, by his laxity in following up the alleged murderers, has demonstrated his sympathy, if not his connivance, with them.

"These allegations, which, if judicially substantiated, might make a strong case against the guilty parties, do not modify the essential point, which is, that the writ under which the sheriff acted was issued in merely civil process, against property only, not against the body of the deceased, and that resistance to a writ of this nature could not call for or warrant the resort to such violence upon the person of the resisting party as appears to have been committed. Killing, in personal malice, by an officer, of a defendant in a civil process in such officer's hands, such killing being subsequent to the execution of the writ, is as collateral to the official action of the officer as would be the commission of arson against the dwelling, or rape of a member of the family, of the party (defendant) by such an officer after the civil process has been served. Hence the attendant *animus* may be left aside in the consideration of this case; for the personal motive which may prompt an agent to do an unlawful act not within the scope of his agency, and entirely collateral to it, can in no wise affect the question of the alleged responsibility of the principal for the agent's acts; unless, indeed, it be shown that the principal shared in the criminal motive and constituted his agent to the end of its accomplishment, which allegation I do not imagine can be made against the Territorial government of New Mexico or the Government of the United States.

"With the correspondence between Sir Edward Thornton and my predecessors in office touching the position of Her Majesty's Government that this Government is liable for lawless acts committed by individuals charged with the execution of legal process within the United States, you are of course familiar. You will recall the suggestion made to yourself by Mr. Frelinghuysen, January 30, 1882, to refer the Tunstall claim, under authorization of Congress, to the Court of Claims or other judicial resort, and the rejection of that suggestion by Her Majesty's Government, because the proposed adjudication would not be based on

a prior admission of the liability of the United States in the premises subject to the facts being established after judicial inquiry. You will also recall your communication to Mr. Frelinghuysen, under date of June 30, 1882, of Earl Granville's intimation of 'the hope of Her Majesty's Government that the Government of the United States will be able to meet their views in this long pending case, and to suggest some other mode of disposing of it.'

"With that intimation discussion of the matter came to a halt, and I can readily understand the inability of my predecessor 'to suggest any other mode of disposing of it.' In fact, I can quite confidently surmise Mr. Frelinghuysen's conviction that, in suggesting the domestic submission of the merits of the case to a quasi-judicial resort, including in such submission the fundamental question of national liability, the executive had strained to the uttermost any possible conception of its discretion in the premises. For such a forum, being necessarily of domestic institution, and possessing no international jurisdiction or power to enforce its conclusions, could only be properly regarded as an advisory body, entitled to respect by reason of its evident moral competency and impartiality, and the submission thereto of the point at issue could only be deemed a voluntary and temporary delegation of a function of decision inherent in the national sovereignty.

"It is not necessary, in giving a final answer to the questions presented by Her Majesty's Government in this case, to recapitulate the positions taken by Mr. Evarts in his note to Sir Edward Thornton of March 7, 1881. Waiving, in the present discussion, the positions so taken, the first question that meets us on the examination of the claim is as to the liability of the Government of the United States for the debts or torts of officers of a Territory organized under Congressional legislation. That the United States Government is not so liable has been more than once held by courts in the United States.

"The very question, however, of such liability was adjudicated by the joint commission appointed under the convention of February 8, 1853, for the adjustment of claims, then unsettled, preferred by citizens of the United States against Great Britain and by subjects of Great Britain against the United States. The commissioners were Mr. Upham, on the part of the United States, and Mr. Hornley, on the part of Great Britain. The commissioners met in London, on September 15, 1853 and chose Mr. Bates, of London, as umpire. Among the claims presented was one by British subjects, based on bonds issued by the Territory of Florida before the admission of Florida as a State.

"The case was argued on behalf of the claimants by Messrs. Rolt Cairns, and Hannen, who afterwards acquired great eminence on the bench, and by Mr. Thomas as agent and counsel for the United States The claim was based on the assumption that, as Congress could remode or veto Territorial legislation, the Government of the United States wa liable for the conduct of Florida creating indebteduess to a subject o

Great Britain. Mr. Bates, however, as umpire, dismissed this position summarily, saying:

"The first ground of claim [that above stated] need hardly be treated seriously; it might as well be contended that the British Government is responsible for Canada's debentures, because all the acts passed by the Canadian Parliament require the sanction of the home Government before they become laws. (Proceedings of the Joint Commission, Washington, 1855.)

"If the British contention in the present case be good, then the British Government would be liable, not only for the debts of Canada, but for the torts of all the officers of Canada.

"Such a position, it is now submitted, is not merely in conflict with the political basis on which rests the colonial system of Great Britain, but, the case being reversed, is in like conflict with the Constitution of the United States. On Great Britain, in fact, the doctrine of the liability of the sovereign for the torts or debts of dependencies over which he has a general restrictive control would operate far more seriously than on the United States, since it would make Her Majesty's Government liable for the misconduct of local officials, not merely in Canada, but in India, in Australia, in South Africa, and in Egypt.

"But it is not desired to rest our resistance to this claim exclusively on the above position. Appealing to principles acknowledged in common in England and in the United States, it is, in addition, maintained that in countries subject to the English common law, where there is the opportunity given of a prompt trial by a jury of the vicinage, damages inflicted on foreigners on the soil of such countries must be redressed through the instrumentality of courts of justice, and are not the subject of diplomatic intervention by the sovereign of the injured party.

"The position thus stated finds many illustrations in the history of the diplomatic relations of Great Britain and of the United States. Prior to the occurrences now under consideration there must have been many cases in which British subjects supposed that they had suffered loss through the negligence or the malice of subordinate officers of the different States and Territories composing this Union, but no record can be found, at least on the files of this Department, of cases in which, when redress could be had by appeal to local courts of justice, an attempt has been made to substitute for such redress a demand upon the Government of the United States for pecuniary compensation. The same may be said of the many cases in which citizens of the United States may have suffered, or claim to have suffered, injury in Great Britain from the conduct of British officials. When such injury was inflicted upon the high seas, or in foreign uncivilized lands, and especially if inflicted by the armed military or naval power directly emanating from the sovereign executive, then it was properly regarded as the subject of diplomatic intervention; but a careful search in the records of this Department discloses no diplomatic appeal for pecuniary compensation for injuries claimed to have been inflicted on American citizens when on the soil of Great Britain.

"As showing the strictness with which this distinction is maintaine may be mentioned the case of Mr. Henry George, a citizen of the Unite States, distinguished as a man of letters and as a lecturer, who travele in Ireland in 1882. Mr. George, as was afterwards fully shown an conceded, was in no way concerned in any seditious or other illegal pr ceedings against the peace of Great Britain, and there was no evidenc produced, either at the time or since, which suggested the faintest *prim facie* case to justify arrest. He was, however, arrested at Loughrea, o August 8, 1882, without warrant, by governmental subordinates, hi baggage searched, his letters and papers ransacked, and his perso treated with indignity. He was discharged, on the ground that ther was no case against him, and proceeded on his journey, occupied i part in visiting the antiquities and other interesting features of th country. Two days afterwards, at Athenry, a few miles distant fro Loughrea, when about entering on the train for Galway, he was agai arrested, his baggage again searched, his papers again inspected, whil he was kept until midnight a close prisoner by the same magistrate wh had examined and discharged him at Loughrea. He was again dis charged for the same reason that no case existed against him, althoug this should have been as fully known by the magistrate at the time o the second imprisonment as at the time of the first discharge.

"The question of the amount of pecuniary compensation to which Mr George would have been entitled in a court of justice is not now ma terial. So far as concerns the principle, it makes no matter whethe the injury inflicted on him touched his life, or merely his liberty an the sanctity of his property for a few hours. And, so far as concern this principle, it is worthy of notice, in this relation, how clearly th question of liability is defined by Mr. Frelinghuysen in his instructio to Mr. Lowell of October 3, 1882:

"'While citizens of the United States traveling or resident abroad are subject to th reasonable laws of the country in which they may be sojourning, it is, nevertheless their right to be spared such indignity and mortification as the conduct of the offi cers at Loughrea and Athenry seems to have visited upon Mr. George. * * * A you have already addressed a note to Lord Granville on this subject, a reply wil probably soon be received by you. It is trusted that the tenor of that reply ma prove satisfactory to this Government, and also relieve Mr. George from any reproac the arrests are calculated unjustly to cast upon him.' (See *supra*, § 230.)

"It will be observed that there is here no claim whatever for pecuniar compensation to Mr. George. That claim, it is tacitly assumed, is to b remitted to British courts of justice. The request is for explanation t the Government of the United States and exoneration of Mr. Georg from 'reproach.' Yet the arrest of Mr. George, and that of othe 'suspects' under the recent crimes act, was not, it must be remem bered, in the course of the English common law. There was apparentl no responsible prosecutor, there was no hearing in which witnesse could be met face to face, and consequently, under the cover of a legisla tive enactment for the time being, the sufferer was denied all oppor

tunity to establish the possible malice of the allegation which led to his arrest, or to identify the secret accuser who could therefore with impunity wound his sensibilities and subject him to serious distress and suffering. Had there been a commitment, it would not have been in view of a speedy jury trial. Under these circumstances, the case would not have fallen under the rule announced above, that where a foreigner claiming to be injured has redress by an appeal to the courts in the processes of the English common law, a diplomatic demand for indemnity will not be granted by the Government of the country in which the injury is claimed to have been received, yet, even in the case of Mr. George and other citizens of the United States put recently without probable cause under summary arrest in Ireland, we hear of no demand made by the Government of the United States for pecuniary compensation.

"The reason why, in countries subject to the English common law, the question of compensation to foreigners for injuries received on the soil of such countries is exclusively committed to the courts of justice in the place of the injury, is to be found in two conditions:

"The first is, that, as has been already noticed, the party injured has the advantage by that law of a prompt trial by an impartial jury drawn from the vicinage, under the supervision of judges whose integrity, whether it be in England or in the United States, has, viewing them as a body, never been impeached, and who are subject to established and impartial rules of law. The second condition is, that, by the English common law, foreigners, when appealing to courts of justice, have equal rights with subjects. It is not so in other systems of jurisprudence; and it is natural, therefore, that under such other systems of jurisprudence the appeal of a foreigner for compensation should lie, not to the courts which impose upon him unjust discriminations, but through his own sovereign to the sovereign of the country in which the injury has been received. But in countries subject to the English common law, every facility which is given to a subject when approaching a court of justice is given to a foreigner making such approach.

"It is impossible to study, in particular, the annals of English jurisprudence without being struck with the delicate and honorable conscientiousness with which the rights of foreigners in this relation have been maintained. If, in such cases before the English tribunals, there has been any appeal to generosity and sympathy, this has not been in favor of the subject against the foreigner. Nor has it made any difference that the party sued by the foreigner was an officer of the Government.

"Numerous cases of this kind, where the plaintiff was a foreigner and the defendant an officer by whom he was assaulted, or falsely imprisoned, or maliciously prosecuted, are reported in the English books, and in no one of these cases can it be alleged that justice was not meted to the foreign plaintiff as freely as if he had been a British subject. It

is with some pride, also, that it may be declared by this Department that throughout the United States the same impartial justice is administered. Even beyond this, in its scrupulous protection of the rights of foreigners, has our peculiar jurisprudence gone. A citizen of one of our States, injured in such State by a person resident therein, is, in ordinary cases, limited to the State courts for redress. A foreigner suing in such State is given the election between the State courts and the district courts of the United States.

"The practical result of this fair dealing is even more marked in this country than in England. There are reported in our books multitudes of cases in which local officers of justice have been sued by foreigners in our courts for false imprisonment or for malicious prosecution or for assault, and this must needs be the case in communities like ours, in which a large proportion of the population consists of foreigners unfamiliar with our laws.

"In not one of these cases, however, has it ever been maintained that the foreign plaintiff had not at least the same privileges awarded to him as he would have had if he had been a native citizen, nor can the most jealous scrutiny of the proceedings show in a single case any misstatement of law to his disfavor. The first instance, in fact, in which, instead of an appeal to the courts thus open, diplomatic intervention through a sovereign is urged, is that which we now have to discuss.

"Sir Edward Thornton, in his note to Mr. Blaine, of June 16, 1881, took exception to the position attributed to Mr. Evarts that the laws of the Territories, like the laws of the States of the Union, are to be administered by the respective tribunals and officers, free from any control or interference of the Federal Government; but those exceptions were advanced equally on the hypothesis that the acts charged might have been committed in a State of the Union, in which case, as I understand Sir Edward's presentation of Lord Granville's argument, Her Majesty's Government would have claimed that the Federal responsibility still accrued. Without recapitulating the position set up by Mr. Evarts, in technical bar of this claim, and without in any degree waiving the position with which this note sets out, that the Government of the United States is not and cannot be liable for the torts or contracts of the Territories, it must be remembered that New Mexico possesses a duly perfected political organization, which, under the Federal Government, includes the executive and judicial departments existing side by side as co-ordinate yet independent powers, and that, in the courts of New Mexico, foreigners have the same rights of redress as citizens.

"The fact that the authority of those departments emanates equally as to both from the Federal Government, is no reason why either should not be regarded as sole and supreme in its particular functions, or why matters belonging to the judicial department of the Territory should be taken under control and determined upon by the Federal executive

acting either directly or through the Territorial governor. For the Federal executive to take the case out of the control of the judicial branch would at once be to abrogate the constitutional distinction between the executive and the judiciary, and be manifestly an usurpation by the executive of a jurisdiction distinctively judicial, by so arrogating to itself a function exclusively delegated to the courts. It is impossible to see how this could be done in the present case, for the avowed purpose of creating in favor of a foreigner a resort other than and different from that which he possesses in common with native citizens, without violating essential constitutional distinctions and at the same time throwing unmerited discredit on our local judicial system and departing from an unbroken line of precedents, which by themselves have become a law.

"That when the courts of justice are open to a foreigner in a State, the Federal executive will not take cognizance of his complaint, was maintained by Mr. Evarts and Mr. Blaine, on December 30, 1880, and March 25, 1881, when declining to accept for the executive jurisdiction over a claim for damages to certain Chinese inflicted by a mob in Colorado in November, 1880. (U. S. For. Rel., 1881, 319, 335.) The same position was taken by Mr. Webster, in his note of November 13, 1851, to Mr. Calderon de la Barca, who made claim for damages sustained by the Spanish consul and Spanish citizens from a mob in New Orleans, in the preceding month. It was agreed that reparation should be made to the consul, on the ground of his public character. It was otherwise, Mr. Webster maintained, as to Spanish citizens. 'Private individuals,' he said, 'subjects of Her Catholic Majesty coming voluntarily to reside in the United States, have certainly no cause of complaint, if they are protected by the same law and the same administration of the law as native-born citizens of this country.' And, resting in like manner on the position that the executive cannot, within its constitutional function, invade the functions of the judiciary, this conclusion applies as fully to a Territory as it does to a State, and was reached by Mr. Butler, Attorney-General during Mr. Van Buren's administration, in a letter to the President, dated July 5, 1837. (3 Op., 253.)

"The principle is therefore to be regarded as adjudicated and established by the highest international and domestic authority in accordance with the enunciation above given.

"It is interesting to observe that in England the same demarkation between executive and judicial functions has been preserved under circumstances not unlike the deplorable case now brought before us. In 1780, in a riot directed, in a large measure, against foreigners of the Roman Catholic faith, the property and persons of such foreigners were subjected to atrocious outrages, yet no instance is reported of appeals by the sovereigns of these foreigners to the British Crown for remuneration. The various riots which, during Lord Liverpool's administration, were incited for the purpose of driving off foreign citizens and de-

stroying their machinery, were not followed, as far as we can learn, by any diplomatic action for the pecuniary remuneration of the parties injured; though we are informed, by the records of the courts, of prosecutions by which, in the ordinary courts of justice, the perpetrators of those wrongs were punished.

"And in 1850, the distinction before us was enunciated by the British Government under circumstances of peculiar interest. On September 4 of that year, General Haynau, an Austrian officer, who, whatever may have been his severity as a commander in the civil war in which Austria had been engaged, was nevertheless a distinguished representative of a country with which Great Britain was then at peace, visited, with two of his aids, the brewery of Messrs. Barclay, Perkins & Co., then one of the famous objects in London, which strangers were accustomed to inspect. General Haynau was charged with no indecorum in his visit. It became known, however, to the porters and other workmen, who he was, and he was subjected to what Lord Palmerston, in his note in reply to Baron Koller's demand of investigation, admits to have been 'outrageous violence and insult.' (Viscount Palmerston to Baron Koller, September 14, 1850, 42 Brit. and For. St. Pap., 389).

"To the demand of the Austrian minister for executive intervention, however, the answer was, 'that no proceedings can be taken in this case which are not in accordance with the ordinary administration of law.' If a civil suit was to be brought, it was intimated General Haynau must bring it; if a criminal prosecution for assault was to be instituted General Haynau must appear as prosecutor; and as General Haynau did not desire to take such a responsibility, no redress at all was given. The case was an extreme one. The attack had no color of excuse. The party attacked was an aged man, at the time defenseless, an eminent servant of the Austrian Crown, who, if any person not a foreign ambassador could properly appeal for diplomatic intervention, could make such an appeal. The outrage was offered in such a shape as to make it an offense against the Austrian sovereign under whose orders General Haynau had acted in the matters which had provoked the indignation of the workmen at the brewery. Yet, even in this extreme case, the British Government laid down, and laid down properly, the rule that for injuries inflicted on a foreigner on English soil, redress must be sought, not from the executive, but from the courts. And this rule is not affected by the circumstance that it does not appear that any agents of the civil authority, whether in the exercise at the time of civil functions or not, were participants in the acts of outrage complained of, for those acts could not have been deemed in any case to have fallen within the scope of their agency.

"Undoubtedly, as is stated by Sir Edward Thornton, 'the citizens of the different States of the Union would be entitled to recover compensation for lawless acts committed under the like circumstances to those that have occurred in New Mexico.' (Sir Edward Thornton to

Mr. Blaine, June 16, 1881.) But this must be by an appeal, not to the executive, but to the courts; and the precedent just noticed is made still more impressive from the fact that the outrage was committed, not in a wild, remote, and newly-settled country, but in the metropolis of the realm, at the center of the executive and judicial systems of Great Britain, and under the supervision of an ample and well-disciplined police.

"To accept the position of the British Government in this matter would, moreover, lead to utter confusion in the constituted arrangements of our system, which, like that of England, sedulously maintains the executive, judicial, and legislative departments distinct from each other.

"The claim now put forward, if allowed, would usurp judicial functions by the executive and legislative branches, and would substitute a government of will for a government of law. Private loss and injury ensue from temporary disorders and breaches of the peace under any Government. To cite a recent instance near at hand, in 1878 three thousand loaded railway cars were destroyed by a mob at Pittsburgh, in Pennsylvania. For this loss, suits were brought in the courts of law against the municipality of Pittsburgh and judgment recovered. The city applied to the State by petition, and the legislature passed an act to reimburse the city. Whether any of the litigants against the municipality were British subjects does not appear, but if there had been such, their claims would have been heard and decided the same as if they had been citizens of the United States. No person who lost his property, nor the relatives of any who lost his life—and many lives were lost—ever pretended to hold the United States Government responsible.

"Under no aspect of the case is there any right under our law to redress such injuries as Mr. Tunstall suffered, which is not as open to a foreigner lawfully within the United States as to any one of our own citizens. There is no discrimination between them in the forum in which all such claims are to be heard and decided, and that sole forum is provided in the courts of justice.

"The injury complained of is a personal tort, founded as would appear from the allegations contained in the statements submitted on behalf of your Government, on personal motives of malice and vindictiveness in the breasts of the aggressors. For such a tort the guilty party may be properly pursued and punished. But it was not an act of the Government. It was executed neither by its orders, nor in any way for its benefit, but, on the contrary, in opposition to its laws and in violation of its peace. Aside from other considerations, the doctrine of agency would wholly refute such a claim, for the rule of *respondeat superior* does not include acts of disobedience to the superior and wholly outside the scope of the agency.

"The propositions hereinbefore stated are abundantly sustained by an eminent English publicist, as highly esteemed in this country as in England, whose recent decease is so greatly mourned. 'The state,' says Sir R. Phillimore (2 Int. Law, 4), 'must be satisfied that its citizen has exhausted the means of legal redress offered by the tribunals of the country in which he has been injured. If these tribunals are unable or unwilling to entertain and adjudicate upon his grievance the ground for interference is fairly laid.

"'But it behooves the interfering state to take the utmost care, first, that the commission of the wrong be clearly established; secondly, that the denial of the local tribunals to decide the question at issue be no less clearly established. It is only after these propositions have been irrefragably proved that the state of a foreigner can demand reparation at the hands of the Government of his country.'

"This position is thus affirmed by Chief Justice Waite in the case of New Hampshire *v.* Louisiana (108 U. S., 90):

"There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizen against another nation, if the citizens themselves have ample means of redress without the intervention of their Government. Indeed, Sir Robert Phillimore says, in his Commentaries on International Law, vol. ii, 2d ed., p. 12: 'As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the state.'

"It is often profitable in the discussion of international questions of this character to step aside and to consider the results which would flow, in practice, from the mutual admission of the point in contention. So it may be permissible to notice, although it is unnecessary to do more than merely notice, the great inconvenience which would follow the adoption of a precedent such as that now sought to be established by Her Majesty's Government, and which must be presumed to be intended as mutual in the relations of the two countries. Aside from the question of the constitutional barrier between the judicial and the executive branches, it must be remembered that in the executive department there is no machinery provided for examining witnesses or obtaining a juridical verdict on disputed facts.

"Were the proposed precedent established, all suits or claims whatever in which foreigners are plaintiffs or prosecutors would be poured into this Department. Not only would the office in charge of the foreign intercourse be in consequence compelled to assume control over a mass of litigation which it has no means of satisfactorily managing, but the dangers of complications with foreign powers would be infinitely increased. Nor could such an access of business be productive of less inconvenience and embarrassment to the British foreign office, and to ourselves in dealing with that office. Heretofore the complaints made by us to that office for the release of American citizens who were imprisoned as 'suspects' have been satisfactorily adjusted, since all that

we have asked has been a release, which was the subject of ready determination. The issues would be far different, and could not fail to be accompanied by much irritation, if, in such cases, by adopting the suggested precedent, Her Majesty's Government should invite demands in its executive capacity to pay the damages sustained by the parties imprisoned. And the irritation in such a case would not be lessened by the fact, already adverted to, that those arrests were made not in subjection to English common law precedent, but in defiance of such precedent, taking the case out of the rule announced at the beginning of this note, which gives the judiciary exclusive jurisdiction when acting according to the practice of the English common law.

"In this relation, also, it may be proper briefly to advert to the bearing on this case of the position lately taken by the British foreign office, that an American citizen, even when passing transiently through the British dominions, is bound by British allegiance, and required to submit himself to all the conditions of British law.

"But Mr. Tunstall, in the present case, was not, at the time of the lamentable occurrence complained of, transiently passing through the United States. He had entered upon what appears to have been a permanent residence in New Mexico, and had engaged in a business conditioned on such permanency. If, as we must infer from this, when there is no evidence to the contrary, he was then domiciled in New Mexico, he was not even, as far as concerns the administration of the judicial function there, a foreigner, and, on this issue alone, his representatives cannot appeal to the Government of his established domicil through a foreign sovereign for redress. Their rights are cognizable only because they may be proved to flow from the personal status of the decedent, and are therefore dependent upon the judicial proceedings of the country of the decedent's domicil.

"This is doubly clear when we recall the statements made by your predecessors in support of the demand for pecuniary indemnification, that the father of the decedent was a party in interest in his son's enterprise, and had advanced sums to aid in the establishment of the business set up in New Mexico. If Mr. Tunstall died intestate, and left any personal property in New Mexico, it would pass under the laws of that Territory and be distributed in accordance therewith. And such being the law, based on Mr. Tunstall's domicil in New Mexico, his representatives have, under the law of nations, no title to the intervention of a foreign sovereign.

"After a full review of all the facts and circumstances of the case, I am constrained to inform you that this Government cannot admit any liability as attaching to it in the premises, either directly toward the representatives of the murdered man or internationally toward Her Majesty's Government demanding in their behalf."

Mr. Bayard, Sec. of State, to Mr. West, June 1, 1885. MSS. Notes, Gr. Brit.; For. Rel., 1885.

"In our diplomatic correspondence with Great Britain we have taken the ground that there should be no diplomatic intervention in cases (whether in tort or contract) in which there could be a resort to competent legal courts.

Mr. Bayard, Sec. of State, to Mr. Phelps, Aug. 20, 1885. MSS. Inst., Gr. Brit.

"I have the honor to acknowledge your note of the 2d instant, submitting a memorial from Lum Way, a British subject, stating that he had been forcibly and illegally expelled from the town of New Tacoma (W. T.), with the loss of considerable property, on the 3d November, 1885.

"The memorial has received careful attention, and the conclusion has been reached that, on the facts therein stated, this Department is without jurisdiction to act in the matter. The memorialist alleges that for a long time prior to the injury complained of, he was peaceably engaged in business at the town of Tacoma. The inference is, that he had acquired a commercial or business domicil in that town and Territory, and in selecting that locality, voluntarily subjected himself to the usual casualties of border life in a region of country where police control is well known to be imperfect. The injuries were inflicted by mob violence in disregard of the laws and all public authority; consequently his remedy is by resort to the judicial courts, which are open to him for redress, as they are to all similar sufferers, without regard to race or nationality.

"This position was taken by the Department in the note which I had the honor to address you on the 1st June last, in reply to yours of April 28, 1885, in the case of J. P. Tunstall, which appears to be analogous, and I see no reason now to change the views therein expressed, and which it is not necessary for me to repeat, but to which I crave your reference.

"Even if the petitioner were regarded as not having a commercial or business domicil in Washington Territory, but as a mere transient visitor in that locality, his remedy would be through the judicial department of the Government.

"It is believed that this position has not only been maintained with unbroken uniformity by this Government, but has been equally proclaimed and consistently enforced by the British Government in the cases of citizens of the United States traveling within British dominions. For instance, travelers in Ireland have been innocently involved in local disturbances by which they sustained serious damage, and have always been referred to the judicial courts for redress. In this country non-residents and foreigners have the privilege, not extended to the citizens of the State or Territory where the injury is sustained, of electing to sue, either in the State or Territorial courts or in the courts of the United States. Thus a foreigner has not only the same

rights of action as American citizens when suing in the same locality, which is all he would be entitled to under the law of nations, but the additional and important right above referred to, of electing his tribunal, which citizens of the locality do not possess.

"I am therefore compelled to adhere to the position stated in my note of June 1 last, and to refer the present petitioner to the appropriate territorial or district courts having jurisdiction to give relief for his injuries and to punish the alleged criminal."

Mr. Bayard, Sec. of State, to Mr. West, Apr. 10, 1886. MSS. Notes, Gr. Brit. See also Mr. Bayard to Mr. Langston, Jan. 12, 1886. MSS. Dom. Let. See *supra*, § 189.

British subjects may sue in the Court of Claims of the United States. This is a privilege granted only to the citizens or subjects of such foreign Governments as submit to suits by citizens of the United States. The British Government accords this privilege to citizens of the United States by a petition of right.

U. S. *v.* O'Keefe, 11 Wall., 178; Carlisle *v.* U. S., 16 *ibid.*, 147. See App., vol. iii, § 241.

Sovereigns do not interfere with the regular course of the administration of justice where a foreigner is a party, until he shall have gone to the court of last resort with his case.

1 Op., 25, Randolph, 1792.

A nation ought not to interfere in the causes of its citizens brought before foreign tribunals, except in a case of refusal of justice or of palpable injustice.

1 Op., 53, Bradford, 1794.

For the recovery of their property in Florida and for redress of injuries done them, our citizens must apply to the tribunals of that province.

1 Op., 68, Lee, 1797.

By the law of nations, if the citizens of one State do an injury to the citizens of another, the Government of the offending subject should take every reasonable measure to cause reparation to be made by the offender; but if the offender is subject to the ordinary processes of law, the principle does not ordinarily extend to oblige the Government to make satisfaction in case of the inability of the offender.

1 Op., 106, Lincoln, 1802.

The courts of the United States in every State are at all times open to the subjects of a friendly foreign power.

1 Op., 192, Rush, 1816.

The executive will not interfere with the judiciary, while it is in the regular course of giving construction to the acts of Congress, by direct-

ing a *nolle prosequi* of a proceeding against British vessels for a breach of the navigation act of April 18, 1818, after the district court has condemned her to forfeiture.

1 Op., 366, Wirt, 1820.

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.

1 Op., 504, Wirt, 1821.

Where aliens suffer violence from citizens of the United States in their persons or property, they must appeal to the courts for redress; to the State courts, if the offense be a criminal one, and to the State or Federal courts for redress by a civil action.

3 Op., 254, Butler, 1837.

Neither the State of California nor the United States is responsible for loss to the owners of a Peruvian bark lost by the carelessness of one of the associated pilots appointed under the laws of California.

7 Op., 229, 237, 238, Cushing, 1855.

The rule is, that, before a citizen of one country is entitled to the aid of his Government in obtaining redress for wrongs done him by another Government, he must have sought redress in vain from the tribunals of the offending power.

13 Op., 547, Akerman, 1871.

The Government of Brazil is not responsible for damages resulting from the alleged corruption of a municipal judge, in authenticating and ratifying the report of a board of surveyors upon a damaged vessel.

Even if the charge of corruption were established, the Brazilian Government would not be responsible, as the misconduct violated no treaty stipulations, did not benefit the public treasury of the country, and, for aught that appeared, redress could be had in the Brazilian courts.

13 Op., 553, Ackerman, 1871.

An American steamer was seized in the port of Granada by a party of armed men, under an order of a judicial officer of the port, and after a detention of a few hours was released, pursuant to an order of the same judge. The seizure seemed to have been made at the instance of the consignees of the vessel, as a mode of enforcing a supposed legal right. *Advised*, that, as the tribunals of Nicaragua would presumably afford redress, this Government should not at the time interfere.

13 Op., 554, Ackerman, 1872.

(6) BUT THIS DOES NOT APPLY WHERE THERE IS NO LOCAL JUDICIARY, OR WHERE THE JUDICIAL ACTION IS IN VIOLATION OF INTERNATIONAL LAW, OR WHERE THE TEST IS WAIVED, OR WHERE THERE IS UNDUE DISCRIMINATION.

§ 242.

It was maintained before the British and American Mixed Commission sitting in London under the treaty of 1794, that a decision of a British prize court estopped the party against whom it was made from proceedings, when a foreigner, through his own Government. This was contested by Mr. Pinkney, and his position was affirmed by the arbitration acting under the advice of Lord Chancellor Loughborough, and is now accepted law.

See Wheaton's Life of Pinkney, app., *infra*, § 329*a*. *Supra*, §§ 150*a*, 238; *infra*, § 329*a*, as to undue belligerent bias of prize courts.

The rule that a claimant for redress for injuries sustained in a foreign country must first exhaust judicial remedies in such country, does not apply to countries of imperfect civilization, or to cases in which prior proceedings show gross perversion of justice.

Mr. Everett, Sec. of State, to Mr. Marsh, Feb. 5, 1853. MSS. Inst., Turkey. See Mr. Marcy, Sec. of State, on the same subject, to Mr. Pryor, July 15, 1855; *ibid.*

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 be given the commanding officer of our squadron in the Mediterranean that he would 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 the punishment which they so richly deserve."

Mr. Cass, Sec. of State, to Mr. Toucey, Aug. 10, 1858. MSS. Dom. Let. As to display of force, see *infra*, § 321. As to forcible measures to exact payment, see *supra*, § 222.

A clause in a treaty requiring that claims on one Government by citizens of another Government shall be exclusively cognizable by the judicial tribunals of the former, does not apply when such tribunals are closed by arms.

Mr. Fish, Sec. of State, to Mr. Foster, Aug. 15, 1873. MSS. Inst., Mex. Same to same, Nov. 16, 1873; Sept. 22, 1874. *Ibid.*

Laws of a foreign state attempting to deprive citizens of the United States from having recourse to their own Government to press their claims diplomatically, will not be regarded as internationally operative by the Government of the United States.

Mr. Fish, Sec. of State, to Mr. Russell, Sept. 15, 1874. MSS. Inst., Venez. See *supra*, § 9.

A stipulation in a contract to be bound by the laws of the country where the money lent is to be employed does not operate where justice

lenied in such country, though to make out a claim in such a case h denial of justice must be definitely shown.

Mr. F. W. Seward, Acting Sec. of State, to Mr. Logan, Apr. 15, 1879. MSS. Inst., Cent. Am.

A citizen of the United States, Mr. John E. Wheelock, having been ated in 1879 with great cruelty by a Venezuela official named Sotillo, ceeded against Sotillo in the Venezuelan courts, but there, in gross lation of justice and of the rules of international law, was refused ress.

"The general principle here invoked by Mr. Saavedra, that if a crime committed against the person, property, or character of an alien resi- it of the country by a citizen of the country in which such alien may resident, and the Government of such country secures the judgment l punishment of its author, its obligations to the Government of the ty wronged are satisfied, and that it would not in such case owe pe- iary indemnity to the offended, may very well be admitted; but to im this for the proceedings had before the Venezuelan judges in the e of Commissary Sotillo would seem little less than a mockery of tice.

"To the worst features of the outrage perpetrated on Mr. Wheelock e occurrence in the woods) there were no witnesses but the perpetra- s and the victim. Mr. Wheelock's evidence was not before the judges, l there is, therefore, every reason to believe that Sotillo's alleged vin- ation rested solely on his own testimony and that of his subordinate truments.

"To denominate the proceedings against the officer Sotillo as a miscar- ge of justice, is the mildest form of denunciation that can be applied. e sanction of the executive Government of Venezuela imparts to them character of an absolute denial of justice. Were such an outrage as it perpetrated by Sotillo on Mr. Wheelock possible—as fortunately it not—in the United States, and Venezuelan citizens were the subject it, the offending officer would be instantly dismissed from the public vice and handed over to the proper tribunals for trial, and, if found ilty, subjected to the severest punishment denounced by the laws of country against an offense at once so abnormal and inhuman. It is necessary to invoke the principles of the treaty of amity and friend- p (1860) existing between the United States and Venezuela, of the article of which these acts are in clear contravention. It is no less offense against the principles of public law and the civilization of age. This Government would be wanting in that duty which it owes its citizens, and regardless of its own dignity, were it lightly to pass er so flagrant an outrage."

Mr. Evarts, Sec. of State, to Mr. Baker, Oct. 15, 1880. MSS. Inst., Venez.; For. Rel., 1880.

As sustaining this position, see Mr. Frelinghuysen to Mr. Baker, Jan. 16, 1883. MSS. Inst., Venez.; For. Rel., 1883. Same to same, Feb. 24, 1883; *ibid.* Same to same, Nov. 16, 1883; *ibid.*

Obstruction by Spanish officials of a citizen of the United States in Spain in his attempts to obtain judicial redress for injuries there inflicted on him is the subject of international complaint.

Mr. Evarts, Sec. of State, to Mr. Fairchild, Jan. 17, 1881. MSS. Inst., Spain.

"A foreigner's right to ask and receive the protection of his Government does not depend upon the local law, but upon the law of his own country. His citizenship goes with him into whatever country he may visit, and the duty of his Government to protect him so long as he does nothing to forfeit his citizenship accompanies him everywhere. This duty his Government must discharge, and it could not, if it would, be relieved therefrom by the fact that the municipal law of the country where its citizen may happen to be has seen fit to provide under what circumstances he may be permitted to appear before the authorities of that country. Such a law cannot control the action or duty of his Government, for Governments are bound among themselves only by treaties or by the recognized law of nations, and there is nothing in the existing treaties between the two countries or in the law of nations which recognizes as pertaining to Venezuela the right by the enactment of a municipal law to say how, or where, or under what circumstances the Government of the United States may or may not ask justice in behalf of one of its own citizens.

"It may, perhaps, be broadly admitted that when the courts of a country afford adequate remedy to foreigners and natives alike in case of wrongful treatment, resort thereto in the first instance by the aggrieved party may be proper; but even in such a case the right of the sufferer's Government to watch over the proceedings from the outset is inalienable. It is its duty to see at every stage that justice is done, to urge full and speedy compliance with the laws, and by its counsel and remonstrance, its moral and material support, to advance the interest of its wronged citizen.

"Mr. Wheelock's case has, however, passed far beyond the initial stage to which President Guzman's letter would now seek to recommit it. It has reached the higher plane of an apparent denial of justice.

"The correspondence lately published shows that the departmental and State courts of Venezuela successively decided that no grounds existed for continuing the process or ordering the arrest of the commissary, Sotillo, who inflicted the illegal torture upon Mr. Wheelock. On his excellency's own showing, this would have sufficed to dismiss the complaint forever, without recourse or appeal.

"Conceding the right of this Government to ask justice for its injured citizen, the Federal Government of Venezuela ordered the State government to reopen the examination. This was done and the result was the same. Here, then, we have three failures of justice, any one of which, if President Guzman's argument be admitted as well founded, was necessarily final.

"But two years afterward the Venezuelan Government discovered hat 'the result of the proceedings involves civil responsibilities,' and a ourth investigation was held, the result of which amply bore out the llegations of Mr. Wheelock's complaint. Warrants were issued for he arrest of Sotillo, who had meanwhile left the country, and orders vere issued to confiscate Sotillo's property, which he had before this laced out of reach of judicial embargo.

"Now, after more than four years have passed, it is claimed that the esponsibility of Venezuela to punish the offender is met by these tardy nd ineffectual proceedings; and, further, that the sufferer is wholly vithout civil recourse for material reparation, save such as the federal ourt may find due to him from the commissary, Sotillo.

"I may be permitted to pass over, as not meriting serious considera- ion or argument, the allegation which your note implies, that the Gov- rnment of Venezula is not liable 'on account of occurrences over which t had absolutely no control and of which it had no knowledge.' It is ot claimed that the federal Government directed, or was cognizant f, or consented to, the outrage perpetrated by its public servant in the xecution of his public functions.

"The simple complaint of this Government is, that an officer of jus- ice of Venezuela, in the exercise of his official functions, subjected an merican citizen, whom he had arrested on suspicion, to grievous bodily orture to extort from him a confession of guilt. For this act this Gov- rument asks the punishment of the offender, and expects that Ven- zuela will tender an equitable indemnity to the victim.

"The President is surprised at the tardy proposal of Venezuela, now or the first time heard of in connection with the case, that Mr. Wheel- ck shall seek redress at the hands of the high federal court. Even if e had been disposed to consent to such a disposition of the matter in he interest of friendship and harmony between the two countries, a asual examination of the provisional decrees of 14th February, 1873, oncerning the rights and indemnification of foreigners, which prescribe he procedure to which the complaint would be subjected, leads the 'resident to withhold his acceptance of such a resort.

"This Government cannot waive the right of its citizens to claim dip- omatic protection as those decrees require. It cannot admit that if the ourt shall deem the claim for indemnity exaggerated, the American laimant shall forfeit all rights and incur heavy fine or prolonged im- risonment. It cannot consent to allow the court power to dismiss the laim because more than two years have passed since the commission f the injury. It cannot, in a word, regard those decrees as controlling he equitable or moral rights of an injured American citizen.

"I have remarked that more than two years elapsed before any ju- icial resort of Venezuela admitted that Sotillo was even liable to proc- ss. Permit me to ask, in no captious spirit, how it is supposed Mr. Vheelock would have fared had he submitted to those provisional de-

crees in the face of the solemn adjudication of three judicial tribunals of Venezuela that no grounds existed for subjecting the commissary, Sotillo, to legal process? Would fine and imprisonment have been added to the wrong under which he already lay? If so, would it not have been alleged that diplomatic redress was effectually barred to him by reason of his voluntary submission to the operation of those decrees?

"A copy of the present correspondence will be sent to the United States minister at Caracas with instructions to say that this Government does not accept the reply made to its representations, and that it renews its demand for the punishment of the offender, and repeat its expectation that the Government of Venezuela will tender to Mr. Wheelock a just indemnification."

Mr. Frelinghuysen, Sec. of State, to Mr. Soteldo, Apr. 4, 1884. MSS. Notes, Venez.; For. Rel., 1884.

See, as enforcing the same claim, Mr. Bayard, Sec. of State, to Mr. Soteldo, Apr. 3, 1885. MSS. Notes, Venez.; For. Rel., 1885. Same to same, Apr. 10, 1885; *ibid.* July 7, 1885; *ibid.* This claim was compromised for $6,000, payable in two installments. Same to same, Oct. 16, 1885; Dec. 7, 1885; Jan. 14, 1886; Mar. 12, 1886; *ibid.*

"Apart, however, from the question of the jurisdiction and the decisions of the French tribunals, it is evident that for such wrongs as Mr. Frear complains of, the state liable therefor cannot be sued in its own courts, but is directly responsible to the state whose citizen has been injured.

"In the case of the *United States* v. *Diekelman* (92 U. S., 524), the Supreme Court of the United States said:

"A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty. * * * Hence, a citizen of one nation, wronged by the conduct of another nation, must seek redress through his own Government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered.

"The principle of liability here contended for was forcibly stated by Mr. Wheaton in a memorable controversy between the United States and Denmark. He said that 'the acts of a sovereign, however binding on his own subjects, if they are not conformable to the public law of the world, cannot be considered as binding on the subjects of other states. A wrong done to them forms an equally just ground of complaint on the part of their Government, whether it proceed from the direct agency of the sovereign or is inflicted by the instrumentality of his tribunals. (See House Doc., No. 249, 1st sess., 22d Cong., p. 26)."

Mr. Bayard, Sec. of State, to Mr. McLane, June 23, 1886. MSS. Inst. France. See App., vol. iii, § 242.

The test does not apply where the offending Government has, by the acts of its proper organ, relieved the party complaining from appealing to the courts.

13 Op., 547. Akerman, 1871.

(7) CULPABILITY OF CLAIMANT.

§ 243.

To international claims the rules of general jurisprudence in this re-ion apply as follows: A party to a malicious wrong cannot recover m another for damages therefrom resulting to himself. A person ose negligence is the immediate cause of a negligent injury to him-f cannot recover from another damages for such injury.

Diplomatic aid will not be rendered to press on a foreign Government laim which is based on an act against public policy.

Mr. Seward, Sec. of State, to Mr. Whitney, July 24, 1868. MSS. Dom. Let. See App., vol. iii, § § 223, 243.

Where the detention of a vessel in a blockaded port is caused by her sistance to the orders of the properly constituted authorities whom e was bound to obey, she preferring such detention to a clearance on the conditions imposed, her owner, a subject of Prussia, is not "en-led to any damages" against the United States, under the law of tions or the treaty with that power.

U. S. *v.* Dickelman, 92 U. S., 520.

An alien who furnished munitions of war and supplies to the Con-lerate Government, or did any acts which would have rendered him ble to punishment for treason had he owed allegiance to the United ates, is precluded under the act of March 12, 1863, from suing for mages sustained by confiscation of his goods.

Young *v.* U. S., 97 U. S., 39. See cases cited *supra*, §§ 223, 224.

No nation gives herself a claim to call upon other nations for a strict servance of their law who does not observe it strictly upon her own rt not only in the particular class of cases in which she makes the ll, but throughout the whole system of that law.

1 Op., 509, 511, Wirt, 1821.

(8) NO NATIONAL DISCRIMINATION AS TO CLAIMANT.

§ 244.

On this topic see *supra*, §§ 230, 231.

Citizens of the United States when abroad will be protected from scrimination aimed at them on account of their nationality.

Supra, § 189.

A citizen of the United States who abandons his nationality cannot ke the ground that such nationality was discriminated against by a reign State.

Supra, §§ 176 *ff.*

"If, indeed, Mr. Thrasher, in his arrest and trial, did not enjoy the nefits which native-born Spanish subjects enjoy in like cases, but

was more harshly treated, or more severely punished, for the reason that he was a native-born citizen of the United States, it would be a clear case of the violation of treaty obligations, and would demand the interposition of the Government. There exists in this Department no proof of any such extraordinary treatment of Mr. Thrasher."

Report on Thrasher's case by Mr. Webster, Sec. of State, to the President, Dec. 23, 1851. 6 Webster's Works, 530. See as to this case *supra*, §§ 190, 203, 229, 230; *infra*, § 357.

"The principle upon which this decision rests is that protection and allegiance are reciprocal; that the citizen of the United States who becomes domiciliated in another country, contributing his labor, talents, or wealth, to the support of society there, becomes practically a member of the political State existing there, and for the time withdraws himself from the duties of citizenship here, and consents to waive the reciprocal right of protection from his own Government."

Mr. Seward, Sec. of State, to Mr. Burton, Jan. 16, 1862. MSS. Inst., Colombia.

"We are not entitled to claim for our citizens on trial in that Kingdom (Great Britain) privileges which are, 1st, not granted by British law to British subjects; 2d, are not allowed in the United States to aliens of any country in any case, civil or criminal."

Mr. Fish, Sec. of State, to Mr. Rogers, Jan. 11, 1870. MSS. Dom. Let. See *supra*, § 189.

That taxation, when not unequal, cannot be excepted to by aliens, see *supra*, § 204.

"British subjects, when within the territorial jurisdiction of the United States, are required to respect and obey the laws of the United States, and when held to answer for any offense against these laws in the courts of the country, have the same rights and privileges extended to them that are enjoyed by citizens held to answer for similar offenses. Citizens of the United States, when held to answer in the courts of Great Britain or her colonies, have a right to demand the same privileges extended to British subjects under like circumstances."

Mr. Davis, Acting Sec. of State, to Mr. Austin, July 17, 1873. MSS. Dom. Let.

That a sovereign is as much bound to redress wrong done by an erroneous decision of a court (even of admiralty) as by erroneous executive action, see *infra*, § 329*a*; *supra*, § 238.

XIII. *PRACTICE AS TO PAYMENT.*

§ 245.

"I am under the impression that the payment by diplomatic agents, either directly or through this Department, to claimants on foreign Governments of moneys which may be recovered from such Governments in satisfaction of claims is, to say the least, irregular, and imposes responsibility where it does not properly belong."

Mr. Clayton, Sec. of State, to Mr. Shields, May 19, 1849. MSS. Inst., Venez.

A minister who collects from a foreign Government, under instructions from his Government, a sum due a citizen of the United States, is not entitled to make any charge for expenses of collection, even though he act at the time under a power of attorney from the claimant.

Mr. Marcy, Sec. of State, to Mr. Peden, Apr. 10, 1856. MSS. Inst., Arg. Rep. See *supra*, § 99.

The currency in which an award is to be paid is that of the country where it is payable, and hence an award payable by the United States Government in the United States may be paid in Treasury notes which are at the time of the payment a legal tender.

Mr. Seward, Sec. of State, to Mr. Mortano, Feb. 12, 1866. MSS. Dom. Let. Affirmed in letter of Mr. Seward to Messrs. Embry *et al.*, May 20, 1867.

The validity of assignments of claims, such as those presented before commissioners under treaty conventions, has been recognized by the various boards of commissioners and the courts of justice for many years.

Judson *v.* Corcoran, 17 How., 614.

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.

Under the Chinese indemnity treaty an award that the payment shall be in gold is legal.

Tyers *v.* U. S., 5 Ct. Cls., 509.

That the circuit court for the District of Columbia had jurisdiction to adjudicate, under a bill in equity, the title of contesting claimants to a fund awarded to be paid under the Mexican treaty, see Clark *v.* Clark, 17 How., 315.

As to settlement of conflicting claims to an award, see Comegys *v.* Vasse, 1 Pet., 123; Judson *v.* Corcoran, 17 How., 612.

As to Geneva awards, see Abbott's National Digest, title, Geneva awards. As to treaty of 1871, and its rules, see *supra*, § 150*g*. As to action of Geneva tribunal, see *infra*, § 402*a*.

The decision of the head of a Department directing payment of a particular claim, is binding upon all the subordinate officers by whom the same is to be audited and passed.

5 Op., 87, Johnson, 1849.

As Henry de la Francia, the original claimant, was dead at the time of the passage of the supplementary act of 1848 (9 Stat. L., 736), authorizing the Secretary of State to settle his claim for advances, etc., and as the claim was assets belonging to his estate, the avails of which were to be

accounted for as such, it was advised that the amount awarded should be paid only to an administrator duly appointed and authorized to receipt for the estate. As, however, it appeared that a competent court had decided Joseph de la Francia to be the sole distributee entitled to the amount from the administrators, the Secretary was advised to take a receipt from him or his attorney also. It was also held that under a power of attorney executed by Joseph de la Francia to James Bowie, the latter had authority to substitute Isaac Thomas in his stead; but that Thomas could not legally substitute William Cost Johnson in his stead.

5 Op., 135, 137, Johnson, 1849.

It was further held that the receipt and acquittance in blank, purporting to have been signed by Isaac Thomas, if authentic, gives authority so to fill it up as to make it a full discharge and acquittance of all title to the sum awarded to said Joseph de la Francia by the Secretary of State.

Ibid.

Where money is due from the Government to the heirs of one deceased, and there is a dispute as to the legal descent, such dispute should be decided by the court rather than by the executive officers.

5 Op., 670, Crittenden, 1853.

The Secretary of State has no power to appoint a commission or board to determine how much money a foreign prince shall pay to counsel in the United States for professional services.

6 Op., 386, Cushing, 1854.

An award under the convention with Peru of 1863, "payable in current money of the United States," may legally be paid either in Treasury notes or in specie.

11 Op., 52, Bates, 1864.

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.

10 Op., 31, Bates, 1861.

XIV. *INTEREST.*

NOT GENERALLY ALLOWABLE.

§ 246.

Interest is not an integral part of a debt under the common law of England as accepted in the United States.

Mr. Jefferson, Sec. of State, to Mr. Hammond. 1 Am. St. Pap. (For. Rel.), 201, 237.

As to how far interest is part of an award, see Mr. Clay, Sec. of State. to Mr. Vaughan, Apr. 15, 1826. Same to same, Oct. 12, 1826. MSS. Notes, For. Leg.

When a fund awarded to a claimant is invested by the Department n United States securities, on which interest has accrued between in-estment and payment, such interest is not payable to the claimant.

Mr. Bayard, Sec. of State, to Messrs. Coudert Bros., Oct. 7, 1885. MSS. Dom. Let. Affirming Mr. Frelinghuysen's ruling in letter to same parties of Feb. 26, 1885.

"Your letters of the 8th and 9th instant, in reply to mine of the 7th, ave been received and considered.

"I perceive no reason, in view of the arguments you advance, for re-ersing the decision of the Department under which the retained five er centum of the Cuban indemnity awards has been paid to the claim-nts without the interest accruing thereon by reason of the investment f the funds while held in trust.

"Without entering upon discussion of the points involved, I may bserve that the investment of the retained moneys was in pursuance f the general system founded on section 2 of the act of Congress of 1th September, 1841, now section 3659 of the Revised Statutes, by hich it is prescribed that 'All funds held in trust by the United tates and the annual interest accruing thereon, where not otherwise equired by treaty, shall be invested in stocks of the United States, earing a rate of interest not less than five per centum per annum.' his enactment is silent as to the beneficiary of such a transaction, nd the sole competence of Congress, which prescribed the mode of ivestment, to direct the disposition of the proceeds, is. beyond doubt.

"The precedents of the Japanese indemnity fund on the one hand nd the Alabama claims fund, to which you refer, on the other, show at Congress has exercised its discretion in the premises in each case. t may be remarked further that in the case of the returned Chinese in-emnity fund, Congress applied a part of the accrued interest to the atisfaction of the claim of an American citizen against China.

"It is, I hold, *res adjudicata*, that the Secretary of State has not dis-retionary power to dispose of the accumulations resulting from invest-ents made in pursuance of the act of 11th September, 1841. Holding is, I cannot be bound by what I must deem to have been the improv-

ident intimation contained in my predecessor's letter of September 13, 1880. I have no option but to cause the accumulations in the present case to pass into the public Treasury, where it is always at the supreme disposal of Congress."

Same to same, Oct. 16, 1885; *ibid.*

A mandamus in this case was refused by the supreme court of the District of Columbia (U. S. *ex rel.* Angarica *v.* Bayard, 4 Mackey, 311), on the ground that the question was one of executive discretion, not open to be reviewed by the judiciary. In his opinion, James, J., intimated that were the question one of common-law usage, interest would be allowable, but that being matter of executive discretion, the ruling of the Secretary in this respect established the practice of the Department. The opinion of Judge James on the merits as to the question of interest was *obiter dictum.*

The court does not sanction the allowance of interest on claims against the Government.

Gordon *v.* U. S., 7 Wall., 188.

Interest is, by international law, only to be charged on "damages for withholding money which the party ought to pay and would not or could not."

1 Op., 268, Wirt., 1819. See Geneva award, 4 Papers relating to Treaty of Washington, 53.

By many nations interest is not allowed at all; and by those whose laws allow it among individuals it is not allowed in every case, but only when the particular circumstances make the allowance a matter of equity.

1 Op., 550, 554, Wirt, 1822. See Mr. Jefferson's letter to Mr. Hammond, 1 Wait's St. Pap., 304.

The Government, which is always to be presumed to be ready and willing to discharge its obligations, ordinarily pays no interest; yet from considerations of state policy it has sometimes allowed it, as in the case of claims under the act of 1814. (6 Stat. L., 139.)

5 Op., 105, 138; Johnson, 1849.
To same effect see 5 Op., 227, Johnson, 1850; *ibid.*, 399, Crittenden, 1851.

But as a general rule the United States does not pay interest on any debts of the Government, the only exceptions being cases where the Government stipulates to pay interest, as in public loans, and where interest is given by act of Congress expressly, either by the name of interest or by that of damages.

7 Op., 523; Cushing, 1855.

Acts of Congress authorizing the settlement of claims according to "equity" or "equity and justice" do not give interest; for, as between private individuals, there is no material difference in this respect be-

Ibid.

veen equity and law, and that expression does not change the result s regards the Government.

The following documents may be referred to in this connnection:

Demand of Spain for interest on the amount paid by United States under the 9th article of the treaty of 1819, President Hayes's message of Mar. 1, 1880, Senate Ex. Doc. 101 and House Ex. Doc. 52, 46th Cong., 2d sess.

Correspondence respecting the payment of interest upon claims, President Hayes's message of May 13, 1880, Senate Ex. Doc. 205, 46th Cong., 2d sess.

Report in favor of paying the unsettled claims, and for the payment of interest. Feb. 14, 1881, House Rep. 227, 46th Cong., 3d sess.

[That the subject of United States paying interest is a matter to be determined by the Executive and not Congress, Senate Rep. 922, 46th Cong., 3d sess.; Senate Mis. Doc. 47, 47th Cong., 1st sess.]

Report in favor of asking the President whether, in his opinion, the 9th article of the treaty of 1819 has been fully executed; and also whether, in his opinion, any further legislation is necessary, House R. 1806, 47th Cong 1st sess.

As to interest on claims due foreigners, see Cong. Record, Feb. 5, 1887, for debate in House.

On the subject of interest, reference is made to the following rulings of Mr. Lawrence, 1st Comptroller of the Treasury (1880–1885). The citations from the first two volumes are from the second edition:

General statute does not affect national or State governments, 1 L., 35.
Government presumed to be ready to pay liabilities, 1 L., 35.
Law of, as between individuals, 1 L., 86.
Liability of a State to pay, 1 L., 86.
Allowed on claims by States and United States, 1 L., 106.
Liability of Government to pay, 1 L., 388.
Liability of implied contracts, 1 L., 105.
On contracts, limited by statute, 1 L., 107.
Origin of, in statute law, 1 L., 108.
Right of creditors of Government to demand, 1 L., 109.
Statutes, application of, to Government of U. S. or of State or Territory, 1 L., 85.
Government not within statutes, 1 L., 234.
Accrues only by contract, statute, or by usage, 2 L., 264.
As to, on money held till close of litigation, 2 L., 459.
As to, on money paid after long delay without suit, 2 L., 471.
As to, on money required to be paid by contract, 2 L., 451.
As to, on money required to be paid by statute, 2 L., 459.
As to paying, to intended beneficiary, 2 L., 201.
As to practice of charging, 2 L., 470.
Considered as damages, 2 L., 463.
On judgments in favor of Government, 2 L., 459.
Allowance of, by Departments; 4 L., 575.
Liability of Government to pay, 2 L., 459; 4 L., 220.
Liquidation of, 4 L., 240.
Payment of: United States pays no interest on claims, whether arising out of contracts or otherwise, except in exceptional cases or on express statute (e. g. public loans), 5 L., 495.
Usages as to, between private persons, are not generally applicable to United States. Reasons for rule, 5 L., 496, 497.
Arising by usage or contract: Difference as to interest arising (1) by usage or (2) on contract, 6 L., 148, note.
When payable, and when not payable, on claims, 6 L., 137, 146, 149.

XV. *DAMAGES.*

REMOTE, NOT ALLOWABLE.

§ 247.

By the Geneva tribunal the distinction between immediate and remote (or consequential) damages was maintained; the latter being held not to be properly chargeable.

Infra, § 402*a*. See *supra*, §§ 150*g*, 235*a*. Sustained by President Woolsey and Hon. R. C. Winthrop in articles on the Ameri an case.

A party whose house was destroyed in Florida, so as to give him a claim for its loss, cannot receive, in addition, indemnity for extraordinary expenses incurred by him in taking up his residence in another place.

6 Op., 530, Cushing, 1854.

"The duty of making compensation to individuals whose private property is sacrificed to the general welfare is inculcated by foreign jurists, as correlative to the sovereign right of alienating those things which are not included in the eminent domain, but this duty must have its limits. No Government can be supposed to be able, consistently with the welfare of the whole community, to assume the burden of losses produced by conquest, or the violent dismemberment of the State. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity beyond the power of the state to control, it does not impose any obligation upon the Government to indemnify those who may suffer a loss of property by the cession."

Wheat., Int. Law, pt. iv, ch. iv, § 2. As to necessity, see *supra*, §§ 50, 223*ff*.

General Halleck, after citing the above (1 Baker's Halleck, 256), says: "The history of the State of New York furnishes a strong illustration of this rule of public law. The people of the territory now composing the State of Vermont, separated from New York and erected that territory into a separate and independent State. Individual citizens whose property would be sacrificed by the event, claimed compensation of New York. The claim was rejected on the ground that the independence of Vermont was an act of force beyond the power of New York to control, and equivalent to a conquest of that territory."

XVI. *HOME GOVERNMENT'S LIABILITY FOR ABANDONING CLAIM.*

§ 248.

A Government which neglects properly to present the claim of one of its citizens to a foreign Government, in consequence of which such claim is lost, is not necessarily bound to make good the claim. "The argument of the abstract right is strong, but as the justice obtainable from foreign nations is at all times, and under every state of things, very imperfect, and as the only alternative in cases of denial of justice is the abandonment of the claim or war, a nation by abandoning the claim after exhausting every specific expedient for obtaining justice, neither partakes of the injustice done, nor makes itself responsible to the suf.

ferer; for war, even if it eventually obtains justice for that suffere secures it by the sufferings of thousands of others equally unmerite and which must ultimately remain unindemnified. And mere inabilit to obtain justice cannot incur the obligation it is unable to enforce."

6 J. Q. Adams's Memoirs, 383. As to Department's control of case, see *supra*, 220.

The United States are not bound to make compensation to partie who have neglected to prosecute their cases in the courts having juri diction of their complaints.

5 Op. (Appendix), 692, Lincoln, 1803.

MEADE'S CASE.

The claim of Richard W. Meade, which was presented to the Go ernment of the United States in 1821, and which was before Congres for a series of successive years, was originally against the Governmer of Spain, and was based on losses incurred by him in business dealing with the Government of Spain, prior to the signature of the treaty February 22, 1819. By that treaty it was provided as a part equivale for the cession of Florida, that the United States should renounce a claims of citizens of the United States upon the Spanish Governmen "statements of which, soliciting the interposition of the Governmer of the United States, had been presented to the Department of Stat or to the minister of the United States in Spain, since the date of th convention of 1802, and until the signature of the treaty." The Unite States assumed these debts, and agreed by the treaty to appropria $5,000,000 to their payment. The treaty provided for a board of con missioners to "ascertain the full amount and validity of the claims thu assumed by the United States." The board so constituted was to co vene at Washington, and within three years "to decide upon th amount and validity of all the claims" which were thus assumed. M Meade's claims having been presented in due time to the Department State, and also to the United States minister at Madrid, fell within th category of claims which could be presented to the commission. The claims, before the treaty was ratified, but after the signature by the n gotiators of the contracting parties, were examined and audited by th Spanish Government, and an order made by that Government for the payment out of the royal treasury. Mr. Meade appeared before th commissioners who met at Washington, and maintained not only th his claims were among those protected by the treaty, but that he wa "entitled to a substantive and full satisfaction, whatever may be th *pro rata* allowance to the general mass of the claimants." The commi sioners had at first doubts as to whether they had jurisdiction of th case. They applied to the Secretary of State for advice; and on Marc 9, 1822, were informed by the Secretary, under the President's dire tion, that claims for contracts were not, in the contemplation of th Government intended to have been shut out from the purview of th treaty. Mr. Meade's claims falling in part under this head, they were a admitted for consideration by the commission, with the qualification th the certificate of assessment given by the Spanish Government, as abo stated, was not admissible to prove them. Mr. Meade then applied the Spanish Government for the original vouchers. This was refused the ground that the rejection of the Spanish Government's certifica by the commission was not only a violation of the rule that Gover ment certificates of records or of the results of records are internatio

ally admissible, but that such a rejection was an "insult" to Spain. The commission, however, in April, 1823, reaffirmed their rejection of the Spanish certificate, but advised a renewal of the call on Spain for the original documents. Negotiations with Spain for the surrender of the papers were again opened, and the Spanish Government consented at last to furnish them. But this was too late to enable the papers to be presented to the commission, which, on May 29, 1824, ten days before the expiration of its term, rejected Mr. Meade's claims for want of evidence. Mr. Meade forthwith applied to Congress for relief, asking that a special court be constituted for the trial of his claim.

See Senate Doc. 409, 18th Cong. 2d sess., 5 Am. St. Pap. (For. Rel.), 752; House Doc. 465, 20th Cong. 1st sess., 6 Am. St. Pap. (For. Rel.), 777. Characteristic antagonistic comments on Meade's case will be found in Mr. J. Q. Adams' Memoirs, IV, 104, 148, 251; VI *ibid.*, 234, 272, 300, 309, 377, 511.

The points of international law on which Mr. Meade relied are stated at large in an opinion by Mr. Horace Binney, of December 28, 1821. From this opinion the following passage is taken:

"It has been already stated that the case of Mr. Meade is not one which, by involving a national wrong, made the United States a party and gave her authority to make it the subject of negotiation and compromise. This may be the law in regard to public or national wrongs, among which are to be placed the claims enumerated in the first four clauses of the 9th article, but private property and a claim to redress for a private wrong are not subjects of national negotiation and compromise. If a nation surrenders or compromises these, she must do it either by virtue of her own sovereign power or by authority derived from the individual proprietor, and if no authority to compromise has been given by Mr. Meade, as I have endeavored to show, then the surrender is to be supported only by the sovereign power before spoken of.

"The case of sovereign power *lawfully* applied to the transfer of private property or to the extinguishment of such a private claim as Mr. Meade's is without a doubt a case of national obligation to pay an equivalent to the private proprietor or creditor. Whether we refer to the doctrine of our own Constitution or to the principles of public law, the result is the same.

"'Private property shall not be taken for public use without just compensation.' This is the language of the fifth article of the amendments to the Constitution of the United States. The necessity of this article may be questioned, for it says no more than is implied as a fundamental restraint upon the public use of private property in the constitution of every civilized people, but it serves, at least, to give the sanction of an emphatic public assent to what otherwise might have been exposed to discussion; and it is a particular pledge of the national faith for the indemnity of every American citizen who may be in the predicament referred to.

"The language of the most approved writers upon public law, in their remarks upon the exercise of the eminent domain, is to the same effect.

"Grotius is clear to this point: 'But we must also observe this, that a king may, two ways, deprive his subjects of their rights, either by way of punishment or by virtue of his eminent domain. But if he do it the last way it must be for some public advantage, and then the subject ought to receive, if possible, a *just compensation* for the loss he suffers out of the common stock.' (Grot. War and Peace, 333, b. 2, ch. 14, § 7.)

"The same writer elsewhere remarks: 'This, also, is often disputed, hat right kings have to dispose of the goods of private men to procure peace who have no other power over the goods of their subjects than s they are kings. I have already said that the state has an eminent ight of property over the goods of the subjects, so that the state, or hose that represent it, may make use of them, and even destroy and lienate them, not only upon an extreme necessity which allows to rivate persons a sort of right over men's goods, but for the public enefit, which ought to be preferred to any man's private interest, according to the intention, reasonably presumed, of those who first entered into civil society. To which we must add that the state is obliged o *repair the damages* sustained by any subject on that account out of he public stock; so that he himself, who hath sustained the loss, contribute if it be necessary, according to his quota, to the discharge of hat *public debt*.' (*Ibid.*, 697, b. 3, ch. 20, § 7.)

"The language of Puffendorf is as follows: 'What power the commonwealth hath to excuse the goods (*condonare bona*) of the private ubject upon a pacification must be discovered from the nature of the ranscendental propriety upon the force of which the goods and fortunes f private men, whatever title purchased or possessed by, may be given p whenever the necessities of the state and public interest require it. ut with this consideration, that the state is obliged to *make good such osses* to the subject out of the public revenues, either immediately, or t least as soon as it may be able. But whether a particular subject's oods ought to be excused or taken from him must, in a monarchy, be etermined by the prince, and the whole body of the subjects upon his ommand is obliged to *make satisfaction* to the person that has sustained losses upon the public account *beyond his just proportion*.' (Puff., . 8, ch. 8, § 3 (4th ed.), Dr. Kennett's translation.)

"He says, in another part of the same book: 'But, however, without ispute they that have lost or sacrificed their fortunes to the public afety in such extremities ought to have a *restitution* or *satisfaction* ade to them, as far as possible, by the whole community.' (Book 8, ch. , § 7: On the transcendental propriety, its origin and necessity.)

"Vattel says: 'If the nation disposes of the possessions of an individual, the alienation will be valid for the same reason; but justice emands that this individual be recompensed out of the public money.' Book 1, ch. 22, § 244.)

"And again: 'The necessity of making a peace authorizes the sovereign to dispose of things even belonging to private persons, and the minent domain gives him this right. But these cessions being made or the common advantage, the state is to *indemnify* the citizens who are ufferers by them.' (B. 4, ch. 2, § 12.)

"This language, originally and always that of reason, has now beome the language of authority, to which no nation is superior; the conciences of all being bound by what is so universally just, and their onformity being required by the uniform practice of the civilized world.

"If the United States have extinguished Mr. Meade's claims upon pain by virtue of their own sovereign power, call it the exercise of emient domain, or the taking of private property for public use, or by any ther name, the conclusion is not to be resisted that they owe him a *ist satisfaction*, that they are bound to *repair his damages*, to *make good is losses*, to make him *restitution*, to *indemnify* him, or make him whole. ; would be in violation of the spirit as well as the letter of the rule to npose upon him anything less than indemnity and satisfaction; to re-

quire him to participate with others in the division of an inadequate sum, and to apply to his case a scale that may be well enough graduated for claims which, under all circumstances, are subject to national control, but is a wholly unfit measure of claims surrendered by virtue of eminent domain, and by that surrender become a *public debt*."

4 Am. St. Pap. (For. Rel.), 793.

Mr. Meade's claim came, under an act of Congress, before the Court of Claims in the December term of 1866. From the proofs there submitted it appeared, in addition to the facts above stated, that on the trial before the junta Mr. Meade put in evidence and surrendered all his vouchers and evidences of indebtedness. These were canceled and filed in the finance department of Spain. The Cortes determined to provide for the payment of the decree. They were, however, informed by the Spanish secretary of foreign affairs and by the American minister at Madrid that if the treaty of 1819 were ratified and certain private grants in Florida were annulled, the United States would pay Meade's claim. They accordingly annulled the private grants; Spain ratified the treaty; the United States accepted the ratification and acquired thereby Florida, free from private grants. While the final acceptance of the treaty was under consideration, Mr. Meade notified the President and Senate that if provision was not made for the full and immediate payment of his claim, he preferred to remain a creditor of Spain, and objected to having his claims appropriated by the United States. No such provision was made, and he was sent, with other claimants, before a commission established under the treaty. The commissioners refused to recognize the Spanish decree, and required him to produce the original vouchers. The Government sustained the commissioners in their demand. Spain, however, refused to deliver them, and the commission expired. The United States paid to other claimants the $5,000,000 provided for by the treaty. Mr. Meade's claim was, therefore, lost by the refusal of the United States to recognize the Spanish decree, and of Spain to furnish the original vouchers. By the convention of 1834 (8 Stat. L., 460) the United States again released Spain from all claims of American citizens.

On these facts the following conclusions were reached by the Court of Claims:

"I. The Government may take private property for public use by the terms of a treaty, and may release the *choses in action* of American citizens to a foreign Government.

"A debt due to an American citizen from a foreign Government is as much property as houses and lands, and when taken for public use is to be paid in the same manner.

"A release by the United States to a foreign Government (in part consideration of a cession of territory) of an indebtedness to an American citizen, acknowledged to be valid, is a taking of private property for public use. But where a special mode of obtaining compensation is designated by statute or by treaty, or where the power of assessing or deciding is lodged in a special tribunal, the remedy designated can alone be pursued and no action therefor can be maintained in this court.

"II. The commission established by the treaty with Spain of 181 (8 Stat. L., 252) was a special tribunal, having exclusive jurisdiction c claims arising under the treaty, and no other court can correct its mis takes or revise its decision.

"III. The commission established by the Spanish treaty of 1819 (Stat. L., 252) had jurisdiction of a claim founded on the award or decre of a Spanish junta rendered *subsequent to the date of the treaty*, eve though it embraced interest to the day of its date, where the origina claim existed prior to the date of the treaty and was embraced in it terms."

Meade's case, 2 Nott. & H., 224.

On error to the Supreme Court of the United States, the followin points were decided by that tribunal:

"1. The claims of American citizens against Spain, for which, by th convention (subsequently becoming the treaty) of February 22, 1819 the United States undertook to make satisfaction to an amount not ex ceeding $5,000,000, were such claims as, at the date of the convention were *unliquidated*, and statements of which had been presented to th Department of State or to the minister of the United States. An within this class on the said 22d of February were the claims of th late Richard W. Meade, and this was the only class that the commis sioners appointed subsequently on the ratification of the treaty to pas upon claims had power to pass upon.

"2. This convention, as signed February 22, 1819, subject to ratifica tion within six months, though it was not ratified within the time stipu lated, was never abandoned, though some expressions in the notificatio of August 21, 1819, by the United States to Spain (notifying to tha Government that, after the next day, 'as the ratifications of the conven tion will not have been exchanged,' all the claims and pretensions o the United States will stand in the same situation as if that conventio had never been made) indicated that the United States might be in duced to refuse to carry it into effect.

"3. This notification did not, by the non-ratification within the si months, make revocable the power which citizens of the United States by filing their claims with it, had given their Government to make re clamations against Spain in their behalf, nor did Mr. Meade in point o fact revoke the power which he had so given his Government.

"4. Mr. Meade having subsequently to the appointment of commis sioners presented to them his claims, not in an unliquidated form, bu in the shape of a debt acknowledged by Spain in a judgment against i given by a royal junta, or special judicial tribunal of that country, mad after the above-mentioned notification by the United States, the commis sioners properly rejected the claims as thus made. They did not rejec

his claims in their unliquidated form, and as filed previously to the convention in the Department of State and with the American minister.

"5. The fact that before the said commission rejected the claim of Mr. Meade in the form in which he had presented it—the form, namely, of an award or judgment by a Spanish tribunal for a sum certain—he requested the Government of the United States to procure from the Spanish Government his original vouchers and evidences of debt, under a clause of the treaty which obliged the Spanish Government to furnish, at the instance of the said commissioners, all such documents and elucidations as might be in their possession for the adjustment of the unliquidated claims provided for by the treaty, does not, even assuming that it shows that he meant to present his claims in an unliquidated form, show any cause of action against the United States over which the Court of Claims could exercise jurisdiction.

"6. The award of the tribunal of the Spanish Government in favor of Mr. Meade, made on the 19th May, 1820, was not, in that form, included by the 5th article of the convention of February 22, 1819, renouncing certain unliquidated claims then existing.

"7. There having been no evidence in a finding of the Court of Claims that an assurance, which that court found as a matter of fact had been given by the minister of the United States at the court of Madrid to the Government of Spain, that a debt due by the last-named Government to Mr. Meade would certainly be paid, if a treaty whose ratification had been suspended was ratified, and which treaty was afterwards ratified, was given in pursuance of any instructions from the President or by virtue of any authority from the United States, the said assurance is to be regarded as having been given without authority, and therefore to be held void.

"8. This court does not agree with the Court of Claims in its opinion that on the facts found by it, the United States, by the acceptance of the treaty of Spain of February 22, 1819, and the cession of the Floridas, unencumbered by certain private grants, to a recognition of which as valid our Government had objected, appropriated the property of Mr. Meade, and that he acquired a good claim against them for $373,879.88, for which they were not liable legally and judicially except by and through the investigation, allowance, and award of the commissioners appointed under the treaty. But they do agree with that court in the opinion that the decision of the commissioners, dismissing the claim in the form in which it was presented to them, barred a recovery in the Court of Claims on merits, and that the joint resolution of Congress of July 25, 1866, referring the case back to the Court of Claims after it had been once decided adversely to the claimant, was not a waiver of the bar, and did not allow the court to consider it upon merits irrespective of the dismissal by the commissioners.

"9. This court, in conclusion, expresses its regret that, entitled, as Mr. Meade clearly was, to prove his unliquidated claims before the com-

issioners, he did not do so, and they observe that now the only remedy his representatives is by 'an appeal to the equity of Congress.'"

Meade *v.* U. S., 9 Wall., 691; also reported in 7 C. Cls., 161.

The following documents relate to the Meade claim:

Ex. Doc. 67, 15th Cong., 1st sess.; St. Pap., "Claims," 157 (Senate) and 185 (House), 15th Cong., 1st sess.; 4 St. Pap., For. Rel., §§ 144, 150*ff*; Senate Docs. 11 and 40, 18th Cong., 2d sess.; Senate Doc. 66, 19th Cong., 1st sess.; House Rep. 174, 19th Cong., 1st sess.; House Rep. 58, 20th Cong., 1st sess.; House Rep. 316, 22d Cong., 1st sess.; House Rep. 167, 23d Cong., 1st sess.; Senate Docs. 32 and 236, 24th Cong., 1st sess.; Senate Doc. 169, 24th Cong., 2d sess.; House Rep. 457, 27th Cong., 2d sess.; House Rep. 94, 30th Cong., 1st sess.; House Rep. 5, 33d Cong., 1st sess.; Senate Rep. 109, 33d Cong., 1st sess.; C. Cls. Rep. 236, 36th Cong., 1st sess.; Senate Mis. Doc. 62, 36th Cong., 1st sess.; House Rep. 95, 36th Cong., 2d sess.; House Rep. 341, 46th Cong., 2d sess.

BRIG GENERAL ARMSTRONG.

The claim of the owners of the brig General Armstrong rests on the ame general basis. (See *supra*, § 227; *infra*, §§ 399, 401.) She was destroyed by British cruisers in the harbor of Fayal, in 1814, Portugal iling to maintain the neutrality of the port. The claim against Portual by the United States having been referred to Louis Napoleon as mpire, was decided against the United States. (See *supra*, § 227.) A laim, based on the alleged failure of the United States to maintain eir rights, was then presented to Congress by the parties interested, nd an appropriation was made by Congress for their relief. The folowing documents may be referred to in this relation:

Claim on account of injuries inflicted on the General Armstrong by the British fleet at Fayal, in 1814:

Memorial of Samuel C. Reid, with additional memorial, Senate Mis. Doc. 21, 45th Cong., 3d sess.

Letter of Secretary of State, Senate Mis. Doc. 13, 46th Cong., 1st sess.

Memorial of Samuel C. Reid, House Mis. Doc. 16, 46th Cong., 1st sess.

Favorable report, Senate Rep. 347, 46th Cong., 2d sess.

Favorable reports, House Rep. 1014, 46th Cong., 2d sess.; House Rep. 207, 47th Cong., 1st sess.

Favorable report, Senate Rep. 270, 47th Cong., 1st sess.

A portion of the correspondence with Portugal in reference to the brig General Armstrong is given in the Brit. and For. St. Pap. for 1854-'55, vol. 45, 463.

See *infra*, §§ 399, 401, *supra*, § 227, for a further discussion of this case.

FRENCH SPOLIATIONS.

By the act of Congress of January 20, 1885, entitled "An act to rovide for the ascertainment of claims of American citizens for spolia-ions committed by the French prior to the 31st day of July, 1801," it s provided—

"That such citizens of the United States, or their legal representatives, as had valid aims to indemnity upon the French Government arising out of illegal captures, de-ntions, seizures, condemnations, and confiscations prior to the ratification of the nvention between the United States and the French Republic concluded on the 30th ay of September, 1800, the ratifications of which were exchanged on the 31st day of uly following, may apply by petition to the Court of Claims, as hereinafter provided."

It is declared, however, that the provisions of the act

"shall not extend to such claims as were embraced in the convention between the United States and the French Republic concluded on the 30th day of April, 1803; nor to such claims growing out of the acts of France as were allowed and paid, in whole or part, under the provisions of the treaty between the United States and Spain concluded on the 22d day of February, 1819; nor to such claims as were allowed, in whole or in part, under the provisions of the treaty between the United States and France concluded on the 4th day of July, 1831."

By the third section of the act it is provided that the court shall examine and determine the validity and amount of all claims included within the above description, and that in the course of their proceedings they should receive all suitable testimony on oath or affirmation, and all other proper evidence, historic and documentary, concerning such claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and report such conclusions of fact and law as in their judgment may affect the liability of the United States therefor.

By the fifth section of the act it is made the duty of the Secretary of State "to procure, as soon as possible after the passage of this act, through the American minister at Paris or otherwise, all such evidence and documents relating to the claims above mentioned as can be obtained from abroad."

Under this clause Messrs. James O. Broadhead and Somerville P. Tuck were appointed commissioners to make a preliminary search of the records of the French prize courts or other French archives, from 1792 to 1801, inclusive, to ascertain whether any evidence or documents relating to the claims of American citizens for spoliations committed by the French prior to the 31st of July, 1801, still exist, and if so, the nature and character thereof.

By special instructions accompanying this communication from the Department of State, these commissioners were informed of their employment to undertake the object stated in the following item of the consular and diplomatic appropriation act approved February 25, 1885, to wit:

To pay the expense of a preliminary search, to be made under the direction of the Department of State of the records of the French prize courts or other French archives, from 1792 to 1801, inclusive, to ascertain whether any evidence or documents relating to the claims of American citizens for spoliations committed by the French prior to the 31st of July, 1801, still exist, and if so, the nature and character thereof, the sum of $5,000, or so much thereof as may be necessary, the same to be immediately available.

Their report, giving the result of their mission, is in Senate Ex. Doc. No. 30, 49th Cong., 1st sess.

The argument for the claimants for the payment of French spoliations prior to 1800 is as follows:

By the treaty of 1778 (noticed *supra*, §148) the United States guaranteed, as part of a defensive alliance, the French West India Islands against Great Britain.

The war of 1793, between France and Great Britain, was begun by Great Britain.

President Washington's proclamation of 1793, so far from indicating any determination to maintain this guarantee, enjoined "impartial conduct" between the belligerents.

See *supra*, §§ 148 *ff.*; *infra*, § 402.

Jay's treaty of November 19, 1794, gave to British cruisers and priva eers the right to enter United States ports with their prizes, but limite French prizes to cases of entrance by stress of weather, and preclude French privateers from selling prizes in United States ports. The en isting of American citizens in the French army or navy was als forbidden. British cruisers, both before and after this treaty, wer admitted into American waters. This led to a suspension of diplomati ntercourse with France (see *supra*, §§ 78, 83, 85), and was followed b spoliations by France and by acts of reprisal by the United States Thence arose two cross-claims—the United States against France fo those spoliations, France against the United States for failure to compl with the guarantee of the treaty of 1798, and for favors shown to Grea Britain in contravention of that treaty.

On August 27, 1793, Mr. Jefferson, Secretary of State, addressed th following circular letter to the merchants of the United States:

"Complaint having been made to the Government of the United States of som nstances of unjustifiable vexation and spoliation committed on our merchant vessel by the privateers of the powers at war, and it being possible that other instances ma have happened of which no information has been given to the Government, I have i n charge from the President to assure the merchants of the United States concerne n foreign commerce or navigation, that due attention will be paid to any injurie hey may suffer on the high seas, or in foreign countries, contrary to the law of na ions or to existing treaties, and that on their forwarding hither well-authenticate vidences of the same, proper proceedings will be adopted for their relief."

In 1797 Messrs. Pinckney, Marshall, and Gerry were sent to France i order, among other objects, to obtain redress and to relieve the Unite States from its guarantee. In this they were unsuccessful. (See *supra* § 82 *ff.*, 85.) By the subsequent mission of Messrs. Ellsworth, Davie nd Murray the treaty of September 30, 1800, above quoted (*supra*, 48*a*), was negotiated.

Subsequent claims for French spoliations were reserved by the con vention of 1800. The surrender of these was part of the consideratio of the sale of Louisiana in 1803. By the convention of 1803, by whic his sale was made, it was provided as follows:

"ART. 1. The debts due by France to citizens of the United States contracted be ore September 30, 1800, shall be paid according to the following regulations: * *

"ART. 2. The debts provided for in the preceding articles are those whose result i omprised in the conjectural note annexed to the present convention, and which, wit he interest, cannot exceed the sum of twenty millions of francs."

It should here be stated that the "conjectural note" referred t above was merely an inaccurate memorandum of a French negotiation By mistake and through haste it was never actually annexed to th convention.

"The claims comprised in the said note which fall within the exceptions of the fol owing articles shall not be admitted to the benefit of this convention."

Then follows a specification of the claims intended to be covered b he convention. These are defined inclusively and exclusively—

"(1) INCLUSIVELY.—The preceding articles are to comprehend no debts but suc s are due citizens of the United States for supplies, for embargoes, and for prizes mad t sea."

The further requisites of each class are then defined:

"(*a*) Debts must have been contracted before September 30, 1800. Payment of them must have theretofore been claimed of the actual Government of France, and they must have been those for which the creditors had a right to the protection of the United States.

"(*b*) Prizes comprised only such cases as had been properly appealed within the time alleged to have been specified in the convention of September 30, 1800, and in which the council of prizes had ordered restitution, and in which the captors were insufficient.

"(2) EXCLUSIVELY.—The convention expressly excluded—

"(1) Cases in which captures had been or should be confirmed.

"(2) Cases in which the claimants had established houses of commerce in other countries than the United States, and were in partnership with foreigners.

"(3) Cases involving agreements and bargains concerning merchandise not the property of American citizens."

This summary is taken from the statement of the claimants before the Court of Claims in 1885.

It was part of the claimants' case before the Court of Claims in 1885 that "the convention of 1803 made no provision for the payment of any of the claims for which the United States became liable under the convention of 1800. It was intended solely to provide for the payment of those claims for which France admitted her liability under the convention of 1800, and by reason of the decisions of the board of commissioners" therein provided.

The contention was "that the United States have become liable to pay all unsatisfied claims against France accruing prior to September 30, 1800, and kept alive as valid claims against France by the convention of that date, whether they were within the classes designated by the convention of 1803 or not." "The fact," it was also urged, "is incontestable that by the treaty of 1803 the United States absolutely relinquished on behalf of her citizens all claims retained against France by the treaty of 1800."

For the United States it was argued in reply that there was no assumption of the spoliations by the United States in the convention of 1800–'01, nor in the treaty of 1803. So far as concerns the engagements thus contracted it was maintained that the following positions, taken in President Pierce's veto message (Mr. Marcy being Secretary of State), could not be controverted:

"First. Neither the second article of the convention of 1800, as it originally stood, nor the retrenchment of that article, nor the proviso in the ratification by the First Consul, nor the action of the Senate of the United States thereon, was regarded by either France or the United States as the renouncement of any claims of American citizens against France. (See *supra*, §§ 148 *ff.*)

"Second. On the contrary, in the treaties of 1803, the two Governments took up the question precisely where it was left on the day of the signature of that of 1800, without suggestion on the part of France that the claims of our citizens were excluded by the retrenchment of the second article or the note of the First Consul, and proceeded to make ample provision for such as France could be induced to admit were just, and they were accordingly discharged in full, with interest, by the United States in the stead and behalf of France.

"Third. The United States, not having admitted in the conventio of 1800 that they were under any obligations to France, by reason c the abrogation of the treaties of 1778 and 1788, persevered in this viev of the question by the tenor of the treaties of 1803, and therefore ha no such national obligation to discharge, and did not, either in purpos or in fact, at any time undertake to discharge themselves from any suc obligation at the expense and with the property of individual citizen of the United States.

"Fourth. By the treaties of 1803 the United States obtained fron France the acknowledgment and payment, as part of the indemnity fo the cession of Louisiana, of claims of citizens of the United States fo spoliations, so far as France would admit her liability in the premises but even then the United States did not relinquish any claim of Ameri can citizens not provided for by those treaties; so far from it, to th honor of France be it remembered, she expressly reserved to hersel the right to reconsider any rejected claims of citizens of the Unite States." (See *supra*, §§ 148 *ff.*)

It was further asserted that France and the United States were a war in 1799, and that this war extinguished the indebtedness of eacl country to the citizens or subjects of the other.

As to the question of such war, see *infra*, §§ 333 *ff.*
As to effect of war on such debts, see *supra*, § 240.

It has already been shown that war followed by a treaty of peac which does not provide for prior claims by one party or another ordi narily extinguishes such claims. *Supra*, § 240. Whether there wa such a war between the United States and France in 1797–8 is else where considered, *supra*, §§ 137, 148 *ff*; *infra*, § 333.

The following passages are extracted from the opinion of Judge Johr Davis, giving the judgment of the Court of Claims in the French spolia ion cases on May 17 and May 24, 1886:

"In 1827 Senator Holmes reported that there had been 'a partia war,' but no 'such actual open war as would absolve us from treaty tipulations. * * * It was never understood here that this wa such a war as would annul a treaty.' (19th Cong., 2d sess., Senate Rep. Feb. 8, 1827, 8.)

"Mr. Giles, reporting to the House of Representatives as early a 802, called it a 'partial state of hostility' between the United State nd France.

"Mr. Chambers reported to the Senate in 1828 that—

"'The relations which existed between the two nations in the interval between th assage of the several acts of Congress before referred to and the convention of 180 ere very peculiar, but in the opinion of your committee cannot be considered a lacing the two nations in the attitude of a war which would destroy the obligation f previously existing treaties.'

"Mr. Livingston reported to the Senate in 1830 that—

"'This was not a case of war, and the stipulations which reconciled the two na ions was not a treaty of peace; it was a convention for the putting an end to certain ifferences. * * * Nowhere is the slightest expression on either side that a state f war existed, which would exonerate either party from the obligations of making hose indemnities to the other. * * * The convention which was the result o

these negotiations is not only in its form different from a treaty of peace, but it contains stipulations which would be disgraceful to our country on the supposition that it terminated a state of war. * * * Neither party considered then they were in a state of war.' (Rep. 4, 445.)

"Mr. Everett made a statement in the House of Representatives on the 21st February, 1835, in which he said:

"'The extreme violence of the measures of the French Government and the accumulated injuries heaped upon our citizens would have amply justified the Government of the United States in a recourse to war; but peaceful remedies and measures of defense were preferred'; [and, after referring to the acts of Congress, he adds:] 'These vigorous acts of defense and preparation, evincing that, if necessary, the United States were determined to proceed still further and go to war for the protection of their citizens, had the happy effect of precluding a resort to that extreme measure of redress.'

"Finally Mr. Sumner considered the acts of Congress as 'vigorous measures,' putting the country 'in an attitude of defense;' and that the 'painful condition of things, though naturally causing great anxiety, did not constitute war.'" (Rep. Com. 41, 38th Cong., 1st sess.)

"The judiciary also had occasion to consider the situation, and the learned counsel for defendants cites to us the opinion of Mr. Justice Moore, delivered in the case of Bass *v.* Tingy (4 Dall., 37), wherein the facts were as follows: Tingy, commander of the public armed ship the Ganges, had libeled the American ship Eliza, Bass master, setting forth that she had been taken on the high seas by a French privateer the 31st March, 1799, and retaken by him late in the following April, wherefore salvage was claimed and allowed below. Upon appeal the judgment was affirmed. Each of the four justices present delivered an opinion.

"Justice Moore, answering the contention that the word 'enemy' could not be applied to the French, says:

"'How can the character of the parties engaged in hostility or war be otherwise described than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, they should be called enemies; for it is by that description alone that either could justify or excuse the scene of bloodshed, depredation, and confiscation which has unhappily occurred, and surely Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy.'

"Justice Washington considers the very point now in dispute, saying (p. 40):

"'The decision of the question must depend upon * * * whether at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between two nations. It may, I believe, be safely laid down 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. If it be decreed in form it is called solemn and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act

nder special authority and can go no further than to the extent of their commission. till, however, it is public war, because it is an external contention by force between ome of the members of the two nations, authorized by the legitimate powers. It is war between the two nations, though all the members are not authorized to commit ostilities such as in a solemn war where the Government restrain the general power.'

"Applying this rule he held that 'an American and French armed essel, combating on the high seas, were enemies,' but added that France vas not styled 'an enemy' in the statutes, because 'the degree of hosility meant to be carried on was sufficiently described without declaring var, or declaring that we were at war. Such a declaration by Congress night have constituted a perfect state of war which was not intended y the Government.'

"Justice Chase, who had tried the case below, said:

"'It is a limited, partial war. Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain ases. There is no authority given to commit hostilities on land, to capture unarmed 'rench vessels, nor even to capture French armed vessels in a French port, and the uthority is not given indiscriminately to every citizen of America against every itizen of France, but only to citizens appointed by commissions or exposed to immeiate outrage and violence. * * * If Congress had chosen to declare a general var, France would have been a general enemy; having chosen to wage a partial war, 'rance was * * * only a partial enemy.'

"Justice Patterson concurred, holding that the United States and 'rance were 'in a qualified state of hostility'—war '*quoad hoc*.' As far s Congress tolerated and authorized it, so far might we proceed in ostile operations, and the word 'enemy' proceeds the full length of his qualified war, and no further.

"The Supreme Court, therefore, held the state of affairs now under liscussion to constitute partial warfare, limited by the acts of Congress.

"The instructions to Ellsworth, Davie, and Murray, dated October 2, 1799, did not recognize a state of war as existing, or as having exsted, for they said the conduct of France would have justified an imediate declaration of war, but the United States, desirous of mainaining peace, contented themselves 'with preparations for defense and neasures calculated to defend their commerce.' (Doc. 102, p. 561.) Yet all the measures relied upon as evidence of existing war had taken ffect prior to the date of these instructions. So the ministers, in a ommunication to the French authorities, said, as to the acts of Congress, 'which the hard alternative of abandoning their commerce to uin imposed,' that 'far from contemplating a co-operation with the nemies of the Republic [they] did not even authorize reprisals upon ier merchantmen, but were restricted simply to the giving of safety o their own, till a moment should arrive when their sufferings could e heard and redressed.' (Doc. 102, p. 583.)

"France did not consider that war existed, for her minister said that he suspensions of his functions was not to be regarded as a rupture beween the countries, 'but as a mark of just discontent' (15 November, 796, 1 For. Rel., 583), while J. Bonaparte and his colleagues termed it 'transient misunderstanding' (Doc. 102, p. 590), a state of 'misunderstanding' which had existed 'through the acts of some agents rather han by the will of the respective Governments,' and which had not een a state of war, at least on the side of France. (*Ibid.*, 616.)

"The opinion of Congress at the time is best gleaned from the laws hich it passed. The important statute in this connection is that of

May 28, 1798 (1 Stat. L., 561), entitled 'An act more effectually to protect the commerce and coasts of the United States.' Certainly there was nothing aggressive or warlike in this title. * * *

"Just complaint was not, however, confined to one side, for we had failed in performance of obligations imposed upon us by the treaties of 1778. We had undertaken a guarantee of French possessions in America and pledged ourselves that 'in case of a rupture between France and England the reciprocal guarantee * * * shall have its full force and effect the moment such war shall break out.' (Art. 12, treaty of alliance.) This guarantee was to endure 'forever.' It was contended by us that the *casus fœderis* could never occur except in a defensive war. As Secretary Pickering said:

"'The nature of this obligation is understood to be that when a war really and truly defensive exists, the engaging nation is bound to furnish an effectual and adequate defense, in co-operation with the power attacked.' (Doc. 102, 457, Pickering to Pinckney *et al.*, July 15, 1797.)

"Whether the treaty so limited the obligation, or whether France in her struggle with the allied powers was waging a defensive war, is not now important. France certainly believed herself entitled to demand our aid, and understood the *casus fœderis* to have occurred.

"At the opening of the war France possessed the fertile islands of St. Domingo, Martinique, Guadeloupe, St. Lucia, St. Vincent, Tobago, Deseada, Marie-Galante, St. Pierre, Miquelon, and Granada, with a colony on the mainland at Cayenne, and 'in little more than a month the French were entirely dispossessed of their West India possessions, with hardly any loss to the victorious nation.' (Alison's History, vol. 3, p. 396.)

"The French colonists urged us to intervene, but the French Government thought it wiser for us not then to embark in the war, as it might diminish their supplies from America; they would, however, they said, leave us to act according to our wishes, looking to us meantime for financial aid. (1 For. Rel., 688.) This was not a renunciation of the guarantee, nor was it so regarded here.

"A study of the correspondence shows that these provisions of the two treaties, especially the guarantee, constantly hampered our ministers, and Jefferson said he had no doubt 'we should interpose at the proper time' (4 Jeff. Works, 102), while the French Government dwelt upon the 'inexecution of the treaties' (1 For. Rel., 658), said 'they had much cause of complaint against us' (*ibid.*, p. 731), and finally refused to receive Pinckney 'until after a reparation of grievances,' while their minister here demanded 'in the name of American honor, in the name of the faith of the treaties, the execution of that contract which assured to the United States their existence and which France regarded as the pledge of the most sacred union between two people the freest upon earth.' (1 For. Affairs, 579 *ff.*)

"The claims of France, national in their nature, were thus set up again against the claims of the United States, individual in their inception, but made national by their presentation through the diplomatic department of the Government.

"It is not for us to say whether the claims of France had any validity in international law, because for the purpose of this case it need only be observed that they were urged in diplomacy with every apparent belief that the French position was tenable. Whether valid or not they were an efficient arm of defense against our contentions, and were so used with ability, skill, and success. In fact there is a recognition of ap-

parent justness in these demands found in the instructions to the Pinc
ney mission, who were directed, while urging our claims, to propose
substitute for the mutual guarantee 'or some modification of it,' as 'i
stead of troops or ships of war' 'to stipulate for a moderate sum
money or quantity of provisions to be delivered in any future defensiv
war not exceeding $200,000 a year during any such war' (2 For. Rel
155), and Talleyrand on the other side told Mr. Gerry (June 15) tha
the Republic desired to be restored to the rights which the treatie
conferred upon it, and through these means to assure the rights of th
United States. 'You claim indemnities,' he said, 'we equally deman
them, and this disposition being as sincere on the part of the Unite
States as it is on its, [the Republic] will speedily remove all the diff
culties.' (Doc. 102, p. 529.) * * *

"The French ministers had frequently mentioned the insuperable r
pugnance of their Government to surrender the claim to priority assure
to it in the 'commercial treaty of 1778,' urging:

"'The equivalent alleged to be accorded by France for this stipulation, the merito
ous ground on which they generally represented the treaty stood, denying stre
nously the power of the American Government to annul the treaties by a simple le
slative act; and always concluding that it was perfectly incompatible with t
nonor and dignity of France to assent to the extinction of a r ght in favor of an e
emy, and as much so to appear to acquiesce in the establishment of that right in fav
of Great Britain. The priority with respect to the right of asylum for privateers an
prizes was the only point in the old treaty on which they had anxiously insisted, an
which they agreed could not be as well provided for by a new stipulation.' (Doc. 10
p. 608.)

"The American envoys (July 23, 1800), in answer to the French a
guments, reducing to writing the substance of two conferences, sai
(Doc. 102, p. 612):

"'As to the proposition of placing France, with respect to an asylum for privatee
and prizes, upon the footing of equality with Great Britain, it was remarked tha
the right which had accrued to Great Britain in that respect was that of an asylu
for her own privateers and prizes, to the exclusion of her enemies, wherefore it wa
physically impossible that her enemies should at the same time have a similar righ
With regard to the observation that by the terms of the British treaty the rights
France were reserved, and therefore the rights of Great Britain existed with such lim
tation as would admit of both nations being placed on a footing which should b
equal, it was observed by the envoys of the United States that the saving in th
British treaty was only of the rights of France resulting from her then existing treat
and that that treaty having ceased to exist the saving necessarily ceased also, and th
rights which before that event were only contingent immediately attached and b
came operative.'

"Admission of the continuing force of the old treaties might involv
admission of France's national claims, and in any event would put he
ministers into a most advantageous position, giving them as considera
tion, to be surrendered at her pleasure in the new negotiation, wha
would then be a vested, existing, and acknowledged right to th
guarantee, the alliance and the use of our ports. Placed in this pos
tion, France would be without incentive to action; she would start i
the discussion of a new treaty with more surrendered to her at the ou
set than she had hoped to obtain at the conclusion, and all that she afte
wards gave up would be by way of generous concession. Whatever th
law, whether the treaties were or were not abrogated by the act of Co
gress or the acts of parties, the American envoys were not permitte

to admit the French contention, but were in duty bound to argue that the treaties were without continuing force. They followed this course, saying:

"'A treaty being a mutual compact, a palpable violation of it by one party did, by the law of nature and of nations, leave it optional with the other to renounce and declare the same to be no longer obligatory. * * * The remaining party must decide whether there had been such violation on the other part as to justify its renunciation. For a wrong decision it would doubtless be responsible to the injured party, and might give cause for war; but even in such case, its act of public renunciation being an act within its competence would not be a void but a valid act, and other nations whose rights might thereby be beneficially affected would so regard it.' (Doc. 102, p. 612.)

"After further argument, they added that as it was the opinion of the French ministers that 'it did not comport with the honor of France' to admit the American contentions, and at the same time be called upon for compensation, they offered 'as their last effort' a proposition which suspended payment of compensation for spoliations 'until France could be put into complete possession of the privileges she contended for, and at the same time they offered to give that security which a great pecuniary pledge would amount to for her having the privilege as soon as it could be given with good faith which might perhaps be in a little more than two years; at any rate within seven.' (*Ibid.*, 613.) * * *

"In August, after some delay and apparent friction, the Americans, saying that 'while nothing would be more grateful to America than to acquit herself of any just claims of France, nothing could be more vain than an attempt to discourse to her reasons for the rejection of her own,' made the following propositions (*ibid.*, 623–625):

"'(1) Let it be declared that the former treaties are renewed and confirmed and shall have the same effect as if no misunderstanding between the two powers had intervened, except so far as they are derogated from by the present treaty.

"'(2) It shall be optional with either party to pay to the other within seven years 3,000,000 of francs in money or securities which may be issued for indemnities, and thereby to reduce the rights of the other as to privateers and prizes to those of the most favored nation. And during the said term allowed for option the right of both parties shall be limited by the line of the most favored nation.' * * *

"The Americans made a counter proposal, renewing their offer of 8,000,000 francs to be paid within seven years in consideration that the United States 'be forever exonerated of the obligation, on their part, to furnish succors or aid under the mutual guarantee,' and that the rights of the French Republic be forever limited to those of the most favored nation. (*Ibid.*, 629.) To this the French tersely answered (*ibid.*, 630):

"'We shall have the right to take our prizes into your ports; a commission shall regulate the indemnities owed by either nation to the citizens of the other; the indemnities which shall be due by France to the citizens of the United States shall be paid for by the United States; in return for which France yields the exclusive privileges resulting from the seventeenth and twenty-second articles of the treaty of commerce and from the rights of the guarantee of the eleventh article of the treaty of alliance.'

"Matters now again reached a halting point; neither side would yield; France acknowledged her real object to be to avoid payment of indem-

nity, while the United States, on the other hand, could not assent to ier views as to the guarantee and use of ports. In considerable heat he ministers parted. (*Ibid.*, 632, 633.) The next day the Americans nade another effort, because, as they wrote in their journal (*ibid.*, 634), being now convinced that the door was perfectly closed against all iope of obtaining indemnities with any modifications of the treaty, it nly remained to be determined whether, under all circumstances, it vould not be expedient to attempt a temporary arrangement which vould extricate the United States from the war or that peculiar state of hostility in which they are at present involved, save the immense roperty of our citizens now pending before the council of prizes, and ecure, as far as possible, our commerce against the abuses of capture luring the present war;' therefore they proposed (*ibid.*, 635) that as to he treaties and indemnities the question should be left open; that intercourse should be free; then, with suggestions as to property captured and not definitively condemned, and property which might thereafter be captured, they asked an early interview.

"The French still insisted that a stipulation of indemnities involved an admission of the force of the treaties (*ibid.*, 635–637), and after argument proposed that the discussion of the indemnities, together with the liscussion of article 11 of the treaty of alliance and articles 17 and 22 of he treaty of commerce, be postponed, but with the admission that the wo treaties are 'acknowledged and confirmed * * * as well as the onsular convention of 1788;' that national ships and privateers be reated as those of the most favored nation; that national ships be estored and paid for, and that the 'property of individuals not yet ried shall be so according to the treaty of amity and commerce of 1778, n consequence of which a *rôle d'équipage* shall not be exacted, nor any ther proof which this treaty could not exact.' So after months of negoiation the French ministers come back flat-footed upon the treaties as still existing, something which our representatives were forbidden by heir instructions to admit. Nevertheless this proposal formed the text or discussion, and upon so slight a foundation was built the treaty of 1800.

"After prolonged negotiation, and after striking out the word 'provisional' in the name or description of the new treaty, the American commissioners signed it, although with great reluctance, 'because hey were profoundly convinced that, considering the relations of the wo countries politically, the nature of our demands, the state of France nd the state of things in Europe, it was [their] duty, and for the ionor and interest of the Government and people of the United States hat [they] should agree to the treaty rather than make none.' (*Ibid.* 340.)

"The vital effect of this negotiation as explanatory of the treaty of 1800, upon which the rights of these claimants are founded, explains the rehearsal of its details during which the so-called ultimatum of our Government was abandoned and the contention of the French Government as to the existence of the treaties was admitted. * * *

"The compromise by our ministers, to which they were forced by the position of the French Government, was contained in the second article which read:

"'The ministers plenipotentiary of the two parties not being able to agree at present respecting the treaty of alliance of 6th February, 1778, the treaty of amity and commerce of the same date, and the convention of the 14th of November, 1788, nor upon

the indemnities mutually due or claimed, the parties will negotiate further on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and conventions shall have no operation, and the relations of the two countries shall be regulated as follows.'

"It is apparent that this article makes the treaty temporary and provisional in its nature; it admits that the existence or non-existence of the treaties of 1778, with the liabilities thereby imposed, is open to discussion, and that the indemnities are not provided for; that is, that the very first of the so-called 'ultimata' of Secretary Pickering was temporarily abandoned. The Senate advised and consented to the ratification of the treaty provided this article be expunged, and in its place the following article be inserted:

"'It is agreed that the present convention shall be in force for the term of eight years from the time of exchange of ratifications.'

"Napoleon thereupon consented (July 31, 1801) 'to accept, ratify, and confirm' the convention, with an addition importing that it should be in force for the space of eight years, and with the retrenchment of the second article:

"'*Provided*, That by this retrenchment the two states renounce the respective pretensions which are the object of the said article.'

"The ratifications were exchanged in Paris, July 31, 1801. The treaty, with its addenda, was again submitted to the Senate, and in that form received the approval of that body (December 19, 1801) when it declared that it considered the convention 'fully ratified,' and returned it to the President for promulgation.

"What the respective pretensions were which were the object of the second article does not admit of a shadow of doubt. On the one hand, the alleged continuing existence of the treaties incidentally involving national claims for past acts on our part and more particularly a right to future privileges; on the other hand, indemnity to our citizens for spoliations.

"Our claims were good by the law of nations, and we had no need to turn back to the treaties for a foundation upon which to rest our arguments. Not so with France. Her national claims must necessarily rest on treaty provisions, and the future privileges she desired above all else could in no way be so easily or fully secured as by an admission of the continuing force of those instruments. She therefore insisted that for indemnity we must give treaty recognition. This we absolutely refused to do, and upon this rock twice did the negotiations split, only to be renewed by the patience and patriotism of our ministers. After months of weary discussion the parties stood as to this point exactly where they started, and to save their young and struggling country from further contest the American ministers consented to the compromise. Then the Senate struck the compromise out, and France said in effect, 'Yes, we agree, if it is understood that we mutually renounce the pretensions which are the object of that article,' to which the Senate and the President, by their official action, assented. * * *

"Four years later Mr. Madison, then Secretary of State, instructed Mr. Pinckney, minister in Spain, that 'the claims from which France was released were admitted by France, and the release was for a valuable consideration in a correspondent release of the United States from certain claims on them. The claims we make on Spain were never admitted by France nor made on France by the United States. They

nade, therefore, no part of the bargain with her, and could not b ncluded in the release.'

"The counsel for defendants contends that Mr. Madison referred i his letter to 'national' claims on the part of the United States fo national injury, in the destruction of commerce, the increased cost o he Army and Navy, and the insult to the flag. It should be noted n answer to this position, that the claims against Spain, then unde liscussion, were exactly these claims now at bar, except that Spain wa he party defendant instead of France. As against France capture nade by French privateers under French decrees were taken int French ports, and there condemned. As against Spain captures mad by French privateers under French decrees were taken into Spanisl ports and there condemned by French consuls under the authority an protection of Spain. Spain plead that these claims were settled by th second article of the treaty of 1800, and it was in answer to this ple hat Mr. Madison wrote his letter.

"The subject-matter of the instruction to Pinckney was these claim nd nothing else, for we were not urging 'national' claims on Spain ut the claims subsequently described in the Spanish treaty as thos on account of prizes made by French privateers and condemned b French consuls, within the territory and jurisdiction of Spain.' (Treat f 1819, Art. IX.) These claims were finally recognized, and pai hrough the Florida purchase. (*Ibid.*, Art. XI; see, also, treaty o 802.) * * *

"Mr. Pickering, Secretary of State under the first two Presidents, an vho, above all others, was familiar with the situation and with th ights of the parties, said that we bartered 'the just claims of our mer hants' to obtain a relinquishment of the French demand, and that—

"'It would seem that the merchants have an equitable claim for indemnity from th Jnited States. * * * The relinquishment by our Government having been mad n consideration that the French Government relinquished its demands for a renewa f the old treaties, then it seems clear that, as our Government applied the merchant roperty to buy off those old treaties, the sums so applied should be reimbursed.' (M Clayton's speech, 1846.)

"Mr. Madison, as we have seen, said to Spain that the claims wer dmitted by France, and were released 'for a valuable consideration, nd he termed the transaction a 'bargain.'

"Mr. Clay, in the Meade case, in which his opinion was given in 1821 ive years prior to his report on French spoliations, said that while country might not be bound to go to war in support of the rights of it itizens, and while a treaty extinction of those rights is probably bind ng, it appears—

"'That the rule of equity furnished by our Constitution, and which provides tha rivate property shall not be taken for public use without just compensation applie nd entitles the injured citizen to consider his own country a substitute for the fo ign power.'

"In this conclusion Chief Justice Marshall strongly concurred, sayin o Mr. Preston that—

"'Having been connected with the events of the period and conversant with th ircumstances under which the claims arose, he was, from his own knowledge, satis ied that there was the strongest obligation on the Government to compensate th ufferers by the French spoliations.' (Mr. Clayton's speech, 1846.)

"And he repeated to Mr. Leigh distinctly and positively 'that the United States ought to make payment of these claims.'

"This view of the distinguished jurist and diplomatist is sustained by forty-five reports favorable to these claims, made in the Congress, against which stand but three adverse reports, all of which were made prior to the publication of the correspondence by Mr. Clay in 1826. Besides Marshall, Madison, Pickering, and Clay, the validity of the claims has been recognized by Clinton, Edward Livingston, Everett, Webster, Cushing, Choate, Sumner, and many other of the most distinguished statesmen known to American history, and while opponents have not been wanting, among the most eminent of whom were Forsyth, Calhoun, Polk, Pierce, Silas Wright, and Benton, still the vast weight of authority in the political division of the Government has been strenuous in favor of the contention made here by the claimants. * * *

"Thus, while all claims urged by one nation upon another are, technically speaking, 'national,' it is convenient to use colloquially the words 'national' and 'individual' as distinguishing claims founded upon injury to the whole people from those founded upon injury to particular citizens. Using the words in this sense, it appears that in the negotiations prior to the treaty of 1800, and in effect in the instrument itself, national claims were advanced by France against individual claims advanced by the United States. France urged that she had been wronged as a nation; we urged that our citizens' rights had been invaded. If 'national' claims had been used against 'national' claims, and the one class had been set off against the other in the compromise, of course the agreement would have been final in every way, as the surrender and the consideration therefor would have been national, and no rights between the individual and his own Government could have complicated the situation. But in the negotiation of 1800 we used 'individual' claims against 'national' claims, and the set-off was of French national claims against American individual claims. That any Government has the right to do this, as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere is given him. A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his Government. * * *

"We have not considered the point that the treaties of 1778 were abrogated by the act of Congress passed in 1798. That question, which the ablest minds of the period were unable to solve, and which proved an ever present and enduring obstacle to all negotiation until forcibly removed by Napoleon, with our concurrence, we fortunately are not forced to deal with. The rights of this claimant rest upon no convention, but are founded upon international law. Treaty or no treaty, a foreign nation cannot be permitted to confiscate an American merchantman engaged in legitimate commerce upon the high seas because his crew-list does not fulfill the requirements of that nation's local ordinances. That the act of Congress was binding within the jurisdiction of the United States and was necessarily to be so regarded by our courts does not now admit of question. The treaties were, however,

not only part of the supreme law of the land wherein they were r placed, within the jurisdiction of the Constitution, by a later supren law, to wit, a statute, but they were also, as between the two Repu lics, contracts, which one of the parties attempted to annul. Treati containing no clause fixing their duration are, under certain circur stances, voidable at the option of one party; whether there existed 1798 such circumstances as authorized and made valid an abrogation the treaties of 1778 by the United States was the very question left u settled by the treaty of 1800, the one question upon which by no poss bility apparently could the parties agree."

Opinion of Judge John Davis, on "French spoliations," Court of Claims, M 17, May 24, 1886.

As to construction of treaty, see further, *supra*, § 148 *b*, *c*.

The correspondence of Mr. Pickering, Sec. of State, with Mr. Adot, minist from France, as to French spoliations prior to Nov. 1796, is given in 1 A St. Pap. (For. Rel.), 635 *ff*. See also details given in Mr. Pickering's i structions to Mr. Pinckney of Jan. 16, 1797, *ibid.*, 561.

The following documents may be consulted in this relation:

Mr. Holmes' report to the Senate of Feb. 8, 1827, Senate Doc. 453, 19th Cong 2d sess.; 6 Am. St. Pap. (For. Rel.), 558. Mr. Chambers' report of M 24, 1828, on French spoliations, Senate Doc. 206, 20th Cong., 1st sess. M Livingston's report of Feb. 22, 1830, Senate Doc. 68, 21st Cong., 1st se Mr. Livingston's report of Jan. 14, 1831, Senate Doc. 32, 21st Cong., 2d sess Senate Doc. 51, 22d Cong., 1st sess. Mr. Chambers' Senate report of M 24, 1828, Senate Doc. 500, 20th Cong., 1st sess., 6 Am. St. Pap., 1121. M Cambreleng's report, House Doc. 121, 23d Cong., 2d sess., containing stat ment by Mr. Edward Everett on the same subject. Mr. Howard's report Jan. 20, 1838, House Doc. 448, 25th Cong., 2d sess., giving a series of prior r ports. Report of Mr. Smith, Feb. 5, 1850, from select committee, with M Hunter's minority report, Senate Rep. Com. 44, 31st Cong., 1st sess. R port of Mr. Buel, House Rep. 355, 31st Cong., 1st sess. Report of Mr. Roy Mar. 23, 1860 (adopting Mr. Crittenden's Senate report Feb. 4, 1858), Hou Rep. 259, 36th Cong., 1st sess. Mr. Sumner's report, Apr. 4, 1864, Senate Re Com. 41, 36th Cong., 1st sess. Mr. Sumner's report, Senate Com. 1, 40 Cong., 1st sess. Mr. Sumner's report, Jan. 17, 1870, Senate Rep. 10, 41 Cong., 2d sess.

A history of the applications to Congress prior to 1877 is found in Senate M Doc. 29, 44th Cong., 2d sess.

XVII. *FOREIGN SOVEREIGNS MAY SUE IN FEDERAL COURTS.*

§ 249.

A foreign sovereign (in this case it was Napoleon III) may bring civil suit in the courts of the United States.

The Sapphire, 11 Wall., 164; see King of Spain *v.* Oliver, 2 Wash. C. C., 431.

A suit brought in a court of the United States by a foreign sovereig where the nation he represents is the party substantially aggrieved, in the case of an injury to a public ship, is not defeated, nor does

abate, by a change in the person of the sovereign, or by his deposition. Such change may, if necessary, be suggested on the record.

The Sapphire, 11 Wall., 164.

In this case the court observed that if a special case should arise in which it could be shown that injustice to the other party would ensue from a continuation of proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result.

The Constitution of the United States gives jurisdiction to the courts of the United States, in cases where foreign states are parties, and the judiciary act gives to the circuit courts jurisdiction in all cases between aliens and citizens; but the court refused to inquire, upon a motion, whether Ferdinand VII, King of Spain, could institute this suit, the Government of the United States not having acknowledged him King.

King of Spain *v.* Oliver, 2 Wash. C. C., 429.

CHAPTER X.

MARRIAGE.

I. *MODE OF SOLEMNIZATION.*

(1) At common law, consensual marriage valid.

§ 260.

By the common law, which the colonists of this country brought w them, it is not necessary to the validity of a marriage that it should solemnized by any particular form, or in the presence or with the sa tion of any officer, ecclesiastical or civil.

Patterson *v.* Gaines, 6 How., 550; Blackburn *v.* Crawford, 3 Wall., 175; Mei *v.* Moore, 96 U. S., 76; and cases cited in Whart. Confl. of Laws, §§ 171–: Mr. W. B. Lawrence, in 11 Alb. Law J., 33.

(2) Solemnization valid at place of marriage is valid everywhere.

§ 261.

"Marriages are frequently celebrated in one country in a manner lawful or valid in another, but did any one ever doubt that marria are valid over the civilized world if valid in the country in which tl took place?"

Mr. Webster, Sec. of State, to Lord Ashburton, Aug. 1, 1842. MSS. Notes, Brit.; quoted more fully *supra*, § 38.

"From the proximity of the two countries the intercourse betw them and the likelihood of frequent intermarriages between their spective citizens, it is desirable that the rule upon the subject should uniform in the United States and in Mexico. In this country, in E land, and in most nations on the continent of Europe, a marriage valid if it has been contracted according to the laws of the place wh the ceremony was performed. This may be said to be the almost u versal rule. It has been firmly established in England after elabor discussion and investigation. In one of the principal cases upon subject, the opinion of the celebrated Spanish jurist Sanchez, in fa

of the rule, seems to have been much relied upon. His words are quoted below and ought certainly to be respected by the Mexican church. You may refer the Mexican archbishop to the passage and also to the character of Sanchez and of his treatise '*de matrimonio*,' expressed by Pope Clement VIII, also quoted below. Marriages between Protestants and Catholics are frequent in this country. Although the clergy of that persuasion may in general suppose that this may in some degree conflict with the welfare of their church, it is believed that they seldom if ever seriously oppose such marriages, though some of them may object to perform the ceremony if a Protestant clergyman is also to have an agency therein. It is an unquestionable fact, however, that many marriages take place between Catholics and Protestants in which the ceremony is performed by clergymen of both denominations. Although all Christian sects are equal before the law in this county, it is believed that the Catholics themselves do not object to this."

Mr. Webster, Sec. of State, to Mr. Letcher, Jan. 29, 1851. MSS. Inst., Mex.

"The general rule of our law in this particular, as stated in the opinion of the Attorney-General of the United States of November 4, 1854, is to ascribe validity to marriages when they are valid at the place of celebration. According to the laws of some of the States of the United States, as you are no doubt aware, the ceremony of marriage cannot be legally performed unless certain requirements, the obtaining a license, etc., shall have been duly fulfilled. But these laws, of course, have no effect outside of the jurisdiction of the respective States in which they exist, and I am not aware that the laws of any State of the United States render the consent of its authorities previously obtained necessary to establish the validity of a marriage of one of its citizens celebrated in a foreign country."

Mr. Cass, Sec. of State, to Mr. Hülsemann, Feb. 2, 1860. MSS. Notes, Austria.

The act of June 22, 1860 (Rev. Stat., § 4082), provides that "marriages in presence of any consular officer of the United States, in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall be valid to all intents and purposes, and shall have the same effect as if solemnized within the United States. And such consular officers shall, in all cases, give to the parties married before them a certificate of such marriage, and shall send another certificate thereof to the Department of State, there to be kept; such certificates shall specify the names of the parties, their ages, places of birth, and residence."

"I suppose that upon principles of general legislation the validity of a marriage, or of any other contract, depends upon the law of the place where such marriage or other contract, is entered into. And I suppose also, that if there is no special legislation to the contrary, the effect of such marriage is legally the same in every country as if celebrated therein. But the validity of a marriage and the consequences to result from it to persons or property are very different questions and depend upon

different principles. It is competent for every nation to provide by own laws that marriages, wherever they take place, unless celebra in a particular manner, or under particular circumstances, shall be effectual to secure to parties claiming under them the rights tl would have been entitled to had no such disabling legislation exist

"This is a subject of internal policy, wholly dependent upon lo considerations. But the validity of the marriage itself is quite anotl matter which cannot justly be thus dealt with. Not only is it bi ing upon the parties *in foro conscientiæ*, but it is beyond the reach any rightful legislation. * * *

"Congress has nothing to do with the validity or effect of marria nor with the marriage contract, indeed, except in places subject to exclusive jurisdiction. These are questions which, in the several Stat are regulated by their respective laws, each exercising the pov within its own boundaries. When, therefore. the inquiry is made Europe how a marriage must be celebrated there, not only to be val but to carry with it its proper rights in the United States, no gene answer can be given to the question. The answer must embrace, r only the provisions of the laws of the United States, so far as regar the places governed by those laws, but must embrace also the laws thirty-three States, besides five Territories. It is obvious that a sat factory reply, under such circumstances, is a subject which may p sent some difficulty, and our foreign ministers and consuls should cautious respecting the information they give, lest unfortunate con quences might result to the party seeking it. * * *

"There is no subsequent legislation which confers this jurisdicti I consider that the 31st section of the act of Congress, passed its last session, giving certain judicial powers to ministers and c suls of the United States in foreign countries, and which declares tl marriages celebrated therein in presence of any consular officer, tween persons who would be authorized to marry in the District Columbia, shall have the same force and effect, and shall be valid all intents and purposes, as if the said marriage had been celebra within the United States, provides only for the presence of a consu officer upon such an occasion. And the provision is no doubt a w one, not only because it furnishes security against fraud, but beca it renders more easy the authentication of such marriages in t United States. But it does not withdraw the celebration of such m riages from the authority of the country where they take place, r does it give any power to the consular officer himself to perform t ceremony. And that part of the same section which declares tl such marriages shall have the same effect as if they had been celebra in the United States must, in my opinion, be limited to places and d tricts over which Congress possesses the power of exclusive juris tion, and cannot operate on the respective States."

Mr. Cass, Sec. of State, to Mr. Fay, Nov. 12, 1860. MSS. Inst., Switz.

"Your dispatch of the 9th of February, No. 50, has been received. In that communication you set forth the following facts, namely, that Anna Maria Suter, a native ot the canton of Aargau, in Switzerland, emigrated to the United States, and was married at Philadelphia on the 2d of January, 1855, to John Hürlimann, a citizen of the United States residing in that city; that she bore a son on the 15th of March, 1857, who was baptized John, and that she died on the 29th of March, 1861; that afterwards the father of the said Anna Maria Suter died in the canton of Aargau, leaving a fortune, a portion of which would have fallen to the said Anna Maria, as one of the heirs of the father, if she were living, or to her legitimate issue if she were dead; that proceedings at law have been instituted in Switzerland by John Hürlimann, the father of the aforenamed child, John, son of the said Anna Maria, to recover the portion of the estate beforementioned; and that the legitimacy of the child is denied under law of the canton of Aargau, upon the ground that the marriage in the United States was celebrated without a compliance with the preliminaries prescribed by the laws of the canton. The attorney for the child requests your intervention, and you solicit instructions on the subject.

"You give no facts from which we can determine whether the mother's domicil, immediately before her marriage, remained in Switzerland or had been established in this country; of course her marriage fixed that domicil here.

"That fact, however, may not have had any retroactive bearing upon the mother's antecedent domicil. The law of Congress which declares that women of foreign birth who marry citizens of the United States thereby themselves become citizens, was not enacted until February 10, 1855, a month after the marriage.

"Our law treats as valid a marriage which is valid by the law of the place where it was solemnized.

"The law of Switzerland, and in general those of continental Europe, while admitting that the law of the place controls as to the form of marriage, nevertheless holds that in respect to the capacity of the person to contract marriage the law of the domicil travels with him, and invalidates the union wherever contracted, if it be against the law of his domicil.

"It may, however, I think, be successfully maintained that, even under the European jurisdiction in relation to the capacity of the person to contract marriage, the *bona fide* establishment of a new domicil with the intention of a permanent residence therein, relieves the emigrant from the bonds of his native law.

"Under any circumstances, this, in the first instance, would be a question for the Swiss courts; but under the special provision of our treaty with Switzerland, it is a question for those courts finally. The 6th article, (11 United States Statutes at Large,) declares that any controversy that may arise among the claimants of the same succession as to

whom the property shall belong shall be decided according to the la and by the judges of the country in which the property is situated. think it to be a just construction of this section that it takes the qu tion altogether out of the domain of diplomacy.

"It is proper, however, to express the opinion here, that whether t child now in question shall be held by the courts of Switzerland to legitimate or illegitimate, he is nevertheless a citizen of the Unit States."

Mr. Seward, Sec. of State, to Mr. Harrington, Mar. 21, 1868. MSS. Inst., Swit Dip. Corr., 1868.

As to Swiss treaty above noticed, see *supra*, § 163.

"The authorities of Switzerland have recognized the validity of t marriage in Philadelphia of a Swiss female to a citizen of the Unit States, although such marriage might, according to the law of Switze land, have been deemed void for want of the consent of the authoriti of her native canton."

Mr. Fish, Sec. of State, to Mr. Sistmayer, Apr. 21, 1870. MSS. Dom. Let.

The marriage of a Swiss woman, though it would have been inval if solemnized in Switzerland for the want of consent of the local autho ities, has been held in Switzerland to be valid, so far as this feature concerned, if solemnized in the United States.

Mr. Fish, Sec. of State, to Mr. Jay, July 27, 1871. MSS. Inst., Austria.

"Our law regards every marriage as valid if valid at the place whe it was contracted, and would not even deem it invalid in the Unite States if it was celebrated in accordance with the few and simple requ sites of our law, though it lacked some of the formalities which a made essential by the law of the place where the marriage took place

Ibid.

This extension of the rule cannot now be sustained. A marriage which is i valid from defect of form in the place of solemnization is invalid ever where, unless (1) the local law adopts in such cases the *lex domicilii*, (2) the form omitted was one the parties could not conscientiously adop or (3) it was impossible of adoption, or (4) the marriage was solemniz in a barbarous or semi-civilized land.

Immigrants marrying at a port of embarkation, in view of settling the United States, may be so far regarded as domiciled in that one the United States to which they are bound as to bring them under t shelter of local laws which make marriages solemnized in accordan with the law of the domicil valid.

Ibid. See Whart. Conf. of Laws, § 169 *ff.*

A marriage solemnized by the minister of the United States at De mark, who was also a minister of the Gospel, in his "capacity as minist of the Gospel," "of parties who would be legally entitled to marry in t District of Columbia had they been residing there," was held to be "n

solemnized in accordance with the laws of the United States in relation to such marriage," though no opinion was expressed as to whether the marriage was in itself valid.

Mr. Fish, Sec. of State, to Mr. Cramer, June 14, 1874. MSS. Inst., Denmark. See also Mr. Fish to Mr. Jewell, June 10, 1874. MSS. Inst., Russia.

As asserting the efficacy of the act of June 22, 1860, in legalizing marriages in the presence of consuls abroad, but denying the power of consuls under that act to perform the ceremony, and as criticizing Mr. Cass's instruction of Nov. 12, 1860, see instruction of Mr. Fish, Sec. of State, to Mr. Logan, Aug. 19, 1874. MSS. Inst., Chili.

"You remark that you had only recently become aware that consuls of the United States in Italy had been in the habit of issuing certificates to meet the requirements of section 103 of the Italian civil code, which requires a declaration from competent authority that there are no impediments to a proposed marriage. It is probable, however, that the practice of issuing such certificates has long prevailed, and the Department sees no objection to them if due inquiry be made as to the facts before they are issued.

"The purpose of Congress in requiring the presence of a consul at a marriage may have been to secure the testimony of an official witness of our own to the act, a witness, too, who would be bound to record the transaction in the archives of his consulate and attest it under his official seal.

"Though unofficial witnesses might be held competent to testify, their testimony might not be held available when required. The parties to the marriage, however, could always produce the consul's certificate when occasion might call therefor.

"You are believed to be mistaken in saying that the 48th section of the new instructions of the Department expresses doubt as to whether marriage can be legally celebrated at all between citizens of the United States in a foreign country, unless it be solemnized in conformity with the laws of such country. Your mistake upon this point will, it is believed, be clear to you upon a further examination of the paragraph referred to. The Department has been careful not to express an opinion as to the validity of any marriage under particular circumstances. Its object has been merely to warn, so as to lessen, as far as might be practicable, the peril of contracting a marriage which in any case might be declared to be invalid. It is not the province of an Executive Department to decide the question.

"The provisions of our act of 1860 upon the subject of marriages abroad are not supposed to have been influenced by the legislation of any other country. They are understood to have been in the main designed to correct a practice which prevailed at some points of marriages by consuls without reference to the local law.

"Marriage at legations without regard to the law of the country, on the ground of extraterritoriality, as it is called, is at best a questionable

proceeding, which it may be apprehended would scarcely be sanctione by the courts of the nation where they were solemnized. The tendenc of opinion is believed to be towards narrowing the immunities of dipl matic officers and their places of abode to those limits only which ma be indispensable to enable them to discharge their official duties withou molestation or restraint.

"The use of the legation for the marriage of persons, even of the na tionality of the country to which it belongs, cannot be said to be neces sary or even convenient for diplomatic purposes.

"The competency of this Government to provide generally for th marriage of citizens of the United States abroad has not been called i question, nor has any opinion upon that point been expressed.

"You seem to have overlooked section 24 of the act of Congress of th 18th of August, 1856, which confers upon secretaries of legation author ity to act as notaries in certain cases.

"When the consequences of marriage in respect to property in posses sion, or which may be acquired by gift, purchase, or inheritance to th offspring of the parties, or to the peace of mind or good name of the lat ter, are duly considered, the weight of the responsibility which an offi cer of this Government abroad may incur by in any way countenancing a rash contract of that kind may become apparent."

Mr. Fish, Sec. of State, to Mr. Marsh, Jan. 19, 1875. MSS. Inst., Italy; For Rel., 1875. See also Mr. Fish to Mr. Washburn, Nov. 14, 1874. MSS. Inst. France.

"Your dispatch No. 538, of the 19th ultimo, has been received. I states, in its closing paragraph, that in a case of marriage between Amer ican citizens in Italy, you might advise that a blank in the consula certificate should be filled with the words 'laws of the United States. This, however, would, it is apprehended, not be a judicious course, and it might prove to be judicially untenable. The only law of the United States on the subject of marriage is that which provides that all mar riages celebrated in the presence of a consular officer in a foreign country between persons who would be authorized to marry if residing in the District of Columbia are valid to all intents and purposes as i said marriage had been solemnized in the United States. The phras 'laws of the United States,' might therefore be deemed to imply laws o the several States. Now, as the laws of the several States on the sub ject of marriage are various, if the certificate were to say that the mar riage was performed according to the 'laws of the United States' i might be held to be vague and inaccurate.

"The United States statute on the subject of marriages above re ferred to (Rev. Stat., § 4082) defines those who may be married unde its provisions, namely, 'persons who would be authorized to marr if residing in the District of Columbia,' but is silent as to the person who may perform the ceremony. When, however, it speaks of 'mar

riage in a foreign country,' it is but reasonable to hold that to be a marriage it must be solemnized (in the absence of authority given by the laws of the United States to any other person) by some person authorized, by the law of the country where the marriage takes place, to perform that ceremony, or in some mode recognized by such law.

"In this view it is believed that the blank indicated by you in form of certificate No. 87, in Consular Regulations of September 1, 1874, should be filled with the name of the country in which the marriage takes place, and not refer to the authority of the party performing the ceremony, as derived from the laws of the United States, which do not give authority to any person to solemnize marriages. It is not supposed that actual statutory enactments are essential to give the authority, but such authority as would seem to exist in Italy for the performance of the marriage ceremony by a Protestant priest, as is inferred from the statement in your dispatch, that 'while there is no express provision on the point in the Italian code,' you are assured that such a marriage 'between Americans would be held legal' in Italy.

"Possibly it would be well to use the word 'law,' which will cover unwritten as well as statute law, instead of the word 'laws.'"

Mr. Cadwalader, Acting Sec. of State, to Mr. Marsh, Apr. 15, 1875. MSS. Inst., Italy; For. Rel., 1875.

"The act of June 22, 1860, now incorporated in the Revised Statutes (§ 4082), neither expresses nor implies that a minister shall have like powers with a consul as regards the authentication of a marriage, and the performance of a marriage ceremony within the precincts of a legation would require the presence of a consul to fulfil the law. (Personal Instructions, XLVIII.)

"Unless, therefore, a minister of the United States be required or authorized by the *lex loci* where he officially resides to perform the marriage ceremony he cannot lawfully do so."

Mr. Evarts, Sec. of State, to Mr. Logan, June 8, 1880. MSS. Inst., Cent. Am.

It is not competent for a diplomatic agent of the United States abroad to give an authoritative certificate as to the effect of a divorce granted in the country of his legation.

Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, Jan. 20, 1883. MSS. Inst., Switz.

"A United States consul has no authority, under the laws of the United States, to solemnize marriages, and even if he had such authority it would have to be exercised in obedience to the laws of the country in which he is resident as such consul. Consuls do not possess any extraterritorial privileges in regard to private matters between individuals. The law provides that a United States consul may be present and witness the ceremony, and may give to the parties a certificate of the fact under the consular seal and make a record of it in the archives

of the consulate. A marriage thus celebrated between American citizens in a foreign country, and not in contravention of the laws of such foreign country, if performed by a minister of the Gospel or other person who by the laws of the country in which it takes place is authorized to solemnize marriages, and between persons who would be competent to marry in the District of Columbia, is held by the laws of the United States to be valid in the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. Kohnstamm, Dec. 20, 1883. MSS. Dom. Let.

"(1) In the opinion of the Secretary the act of Congress to which you refer does not affect marriage of persons domiciled in the particular States of the Union. Each of these States is supreme in its legislation as to all matters relating to the conditions of marriage, as well as of divorce, within its limits.

"(2) Even to marriage abroad of persons domiciled in the District of Columbia or in the Territories over which Congress has jurisdiction, the presence and attestation of a consular officer is not, under the act of Congress, necessary. Such marriages, if otherwise valid in the District of Columbia or in the Territories, would be valid, although not solemnized before a consular officer. Nor does the presence of a consular officer by itself give validity to marriages otherwise invalid.

"(3) It is very questionable whether, even as to marriages of persons domiciled in the District of Columbia and in the Territories, the act of Congress has any effect out of those jurisdictions. It is a principle of international law that the forms of solemnizing marriages must conform to the rules established by the law of the place of solemnization. No particular sovereign can withdraw from the operation of that principle the marriages of his subjects when solemnized abroad. He may say, 'In my own dominions these marriages shall be valid,' but he cannot by such a decree change the rule of international law in this respect which is accepted by foreign nations. In other words, the general position is, that a local law cannot extraterritorially affect the law of nations. (*Supra*, §§ 9 *ff.*) We have applied this rule to cases where foreign sovereigns have attempted by local decrees to vary international law in respect to blockade and to piracy. There is no reason why the same rule should not be applied in respect to marriage, and the British Government in its instructions to its diplomatic agents has been careful to make this distinction. It has told them that while marriages of British subjects abroad in ambassadors' residences would be valid in the British dominions, they are, in the opinion of the Crown officers, 'not necessarily valid without the dominions of Her Majesty.' (See Lord Stanley's letter of February 8, 1867, cited in 2 Fraser on Husband and Wife (2d ed., Edinburgh, 1878), 1312.)

"(4) There is no reason, however, why a consul should not permit marriages of American citizens, no matter what may be their domicil,

to be solemnized in his presence whenever they desire it. While he cannot either make or unmake such marriage, he gives in his certificate a memorandum which will enable him, when living, to refresh his memory when called as a witness to the fact of the marriage, and, after his death, such a memorandum may be admissible as documentary proof of the marriage. The fact, also, that the marriage took place in his presence would lead to the inference that it was entered into advisedly.

"(5) The conclusion, which cannot be too strongly impressed, is that when a marriage is solemnized by citizens of the United States in a foreign civilized country, the form of solemnization must be in accordance with that prescribed by the local civil law. If the mode of solemnization is good by this law, it is good everywhere; if it is bad by this law, it is bad in all countries which do not specially validate it by statute. It is true that there are certain exceptions to this rule, in respect to local forms which are oppressive or which are impossible, or which militate against the rational religious convictions of the parties; but these exceptions are so rare that it is not necessary here to notice them, or to regard them as in any way diminishing the force of the rule that the mode of solemnization must be in accordance with the law of the place of solemnization.

"It is true, also, that in some European countries the law is that it is sufficient to validate the marriages of foreigners within their boundaries that the law of the domicil of the parties be observed. But this is only an application of the rule that the law of the place of solemnization must in such cases be supreme. When it says, 'You can follow the law of your domicil,' it gives effect to the law of such domicil only because it itself chooses so to ordain.

"In conclusion, the importance of the maintenance in this respect of the supremacy of the law of the place of solemnization cannot be too highly estimated, nor can our consular and diplomatic representatives impress too strongly this rule upon those who come to them for advice. Any variation from this rule may lead to the annulling of marriages entered into in good faith, and in the bastardizing of the issue of such marriages.

"It is proper to add that the object of this instruction is not to determine as to the validity of any particular marriages that have taken place or may hereafter take place. Questions of this class are for the judicial tribunals. The function of this Department is simply to instruct its diplomatic representatives in civilized countries what advice to give citizens of the United States applying to them for information as to the proper mode of solemnizing marriages, and the answer must be that the ceremonial prescribed by the law of the place of the ceremony must be adopted. They should also be advised that the act of Congress above referred to cannot operate outside of the District of Columbia and the Territories, and that even to persons domiciled in the latter

ırisdictions it is a matter of doubt, which can only be settled in each ase by judical decision, whether the act would be regarded by foreign ourts as changing, so far as concerns their action, the rule of interna- ional law above stated."

Mr. Bayard, Sec. of State, to Mr. Winchester, Aug. 15, 1885. MSS. Inst., Switz.; For. Rel., 1885.

"This Department has never made any publication, in the nature of report or otherwise, of the requisites of a valid marriage in the various tates of Europe. The course of this Department has been to advise itizens of the United States desiring to be married abroad to comply ith the law of the place of the performance of the marriage with refer- nce to its celebration. Marriages so celebrated are generally recog- ized as valid everywhere. To this rule, however, requiring the cere- ıony to be performed according to the law of the place where the ıarriage occurs, there are certain exceptions; as where the marriage s performed in a barbarous land, or the law of the place of celebration nposes conditions impossible of performance or repugnant to the con- cience of the parties. But the general rule applicable to civilized ountries is that the ceremony must be performed according to the law f the place of performance."

Mr. Bayard, Sec. of State, to Mr. Hodges, Nov. 20, 1885. MSS. Dom. Let.

"By the law of nations the forms of solemnization of a marriage must e in accordance with the law of the place of solemnization, and the nly exceptions are when those forms are such as the parties cannot onscientiously comply with, or when the solemnization is in a barbar- us or semi-civilized land. It is true that it is said by some authorities hat a marriage in a foreign legation is governed only by the laws of the ountry such legation represents, but this is so much a matter of doubt hat the British foreign office has instructed its diplomatic agents that lthough such marriages, performed in British legations, are valid in reat Britain by statute, their validity elsewhere cannot be assumed. See my instructions to Mr. Winchester of August 15, 1885, printed in oreign Relations, 1885, p. 807.) Under these circumstances you very ıroperly declined to sanction the solemnization of the marriage in ques- ion until you have information that it would be solemnized in con- ormity with Belgian law."

Mr. Bayard, Sec. of State, to Mr. Tree, June 5, 1886. MSS. Inst., Belgium.

"It is enacted by statute that 'marriages in presence of any *consular* fficer of the United States in a foreign country, between persons who vould be authorized to marry if residing in the District of Columbia, hall be valid to all intents and purposes, and shall have the same effect s if solemnized within the United States.' As under the Constitution f the United States the States have exclusive power of determining he conditions of marriage and divorce as to persons domiciled within heir borders, this statute only covers marriages by persons domiciled n the District of Columbia or in the Territories.

"The statute does not exclude modes of solemnization other than that in presence of a consular officer. Marriages abroad, by citizens of the District of Columbia, or of the Territories, when not in the presence of a consular officer, if otherwise valid, are not invalidated by the above statute. The statute does not authorize the consular officer to perform the ceremony. All that is prescribed is that it is to be in his presence.

"As it is a principle of international law that the law of the place of solemnization shall, whenever this is practicable, determine the mode of solemnization, consuls, when giving their sanction to a proposed marriage of this class, should be satisfied (1) that the parties are domiciled in the District of Columbia or in the Territories, and (2) that the requirements of the law of the place of celebration should be as far as practicable complied with. It is not intended, however, in these instructions, in any way to question or modify the principle of international law that while the form of solemnizing marriage is determined ordinarily by the law of the place of solemnization, exceptions are recognized, (1) when it is impossible to use such form; (2) when it is repugnant to the religious convictions of the parties; (3) when it is not imposed on foreigners by the sovereign prescribing it; (4) when the ceremony is performed, as will be seen in a subsequent clause, in a non-Christian or semi-civilized country.

"In Massachusetts, where the service must be performed, except in the case of Quakers, by a licensed minister or a justice of the peace, a statute has been adopted validating marriages by a consul or diplomatic agent of the United States. This may be the case with other States.

"As a general rule, matrimonial capacity is determined by the law of the place of domicil of the party in question.

"Solemnization by a clergyman or magistrate is not necessary to the validity of a marriage in most jurisdictions in this country.

"The rule as to prevalence of local forms does not apply to non-Christian or semi-civilized countries where consular courts are established. In those countries the consular officer will have to determine, so far as concerns persons domiciled in the District of Columbia or in the Territories, whether the parties would be authorized to marry if residing in the District of Columbia or in one of the Territories. His duty, so far as concerns persons domiciled in a State, is to inquire whether they are authorized to marry in such State. It is held, also, in respect to a consular officer *in such countries* that the right to perform marriage is incident to the judicial office, and consequently that he may solemnize the ceremony if it is the wish of the parties that he should do so. It is deemed preferable, however, in such cases, where there is a duly qualified minister of a religious denomination whose services can be obtained, that the ceremony should be performed by him, and that the consular officer should confine himself to granting the certificate before mentioned.

"The statutory provisions refer only to consuls. It is not unusual for Americans abroad to ask permission to have a marriage ceremony performed in the legation, and in the presence of the minister. There is no reason why a minister or chargé should not comply with this request. But it is proper, at the same time, to inform the parties making the application that, in the opinion of the Department, a ceremony of marriage, performed within the precincts of a legation, should, with the above limitations, comply with the requirements of the laws of the country within which the legation is situated.

"Whenever an application is made for the use of the legation for uch a purpose, it will be the duty of the principal diplomatic repre-entative to inquire whether the parties may lawfully marry accord-ng to the laws of the country in which the legation is situated, and whether the proper steps have been taken to enable the marriage cere-mony to be legally performed according to such laws. If either of these nquiries should be answered in the negative, or if the case does not all within one of the exceptions above stated, it will be his duty to in-orm the applicants that he cannot permit the ceremony to be performed n the legation, as there may be grave doubts respecting its validity.

"If it is desired in such cases by citizens of the District of Columbia r of the Territories to avail themselves of the statute above recited, hen the diplomatic representative should inform them that under the aws of the United States it will be necessary to have the principal onsular officer of the United States present, and he should give them n opportunity to have such officer present, if they desire it.

"In all cases of marriage before a consular officer, the officer shall ive to each of the parties a certificate of marriage, and shall also send certificate thereof to the Department of State, there to be kept.

"This certificate must be under the official seal and must give the ames of the parties, their ages, places of birth and residence, the date nd place when and where the ceremony was performed, and state that he marriage took place before the consular officer giving the certificate. Form No. 87 of the Consular Regulations of 1881.)

"The statute (Rev. Stat., § 4082) does not authorize a diplomatic fficer to witness or certify to a marriage ceremony performed before im."

Printed Pers. Inst. Dip. Agents, 1885. See important instructions, App., vol. iii, § 268.

The general principle in the United States is that the validity of a marriage is to be determined by the law of the place where it is cele-brated. But there is an exception to this rule, when parties are sojourn-ng in a foreign country where the law is such that it is impossible for hem to contract a marriage under it. Such is the case, where, as in ome foreign countries, the local law recognizes a marriage as valid when contracted according to the law of domicil, and where the law f the country goes with the parties, as in the case of an invading army nd its followers.

7 Op., 18, Cushing, 1854.

Marriages celebrated by a consul of the United States in any foreign ountry of Christendom, between citizens of the United States, would ave no legal effect here, save in one of the exceptional cases of its being mpossible for the parties to marry by the *lex loci*. American consuls ave no such power given them by act of Congress, nor by the common aw of marriage as understood in the several States. And marriage, in he United States, is not a Federal question (save as to places under he absolute legislative jurisdiction of the United States), but one to e determined by the several States.

Ibid.

The effect of the act of 1860 has been already discussed in this section.

A consul cannot, as consul, solemnize a marriage, whether he be or not a subject of the foreign Government.

7 Op., 342, Cushing, 1855.

(3) LOCAL PRESCRIPTIONS AS TO FORM HAVE NO EXTRATERRITORIAL FORCE.

§ 262.

Persons domiciled in a State in which certain formalities of marriage are prescribed can marry without such formalities in another jurisdiction where no such formalities are exacted, unless in such jurisdiction the forms of the place of domicil are held to be obligatory.

Supra, §§ 9, 261. See Whart. Confl. of Laws, § 180.

II. *MATRIMONIAL CAPACITY.*

DETERMINED BY NATIONAL POLICY.

§ 263.

Three distinct theories have been advanced as to the law which is to determine matrimonial capacity. The first is the law of the place of solemnization. This undoubtedly holds good as to merely formal conditions, but cannot be regarded as having force when appealed to in a State where the competency of the parties rests on grounds of morality or public policy. The second is that of the law of the domicil of the parties, to which the same objection would apply, while to both of these tests the objection of uncertainty extends. (See Whart. Confl. of Laws, § 164.) A third, and better theory, is that which maintains the prevalence in such cases of the national policy of the country in which the parties assert their marital rights. No civilized nation will regard persons living within its borders as married when by its laws or policy the union is incestuous, polygamous, or otherwise immoral or antagonistic to national policy. (See Reynolds *v.* U. S., 98 U. S., 145; Whart. Confl. of Laws. §§ 131, 165.)

CHAPTER XI.

EXTRADITION.

I. *ORDINARILY NO EXTRADITION WITHOUT TREATY.*

§ 268.

As a general rule, there can be no extradition to a foreign state without treaty.

Mr. Jefferson, Sec. of State, to Mr. Genet, Sept. 12, 1793. 1 Am. St. Pap., (For. Rel.), 177. Mr. Forsyth, Sec. of State, to Mr. Price, Nov. 29, 1834. MSS. Dom. Let. Mr. Forsyth, Sec. of State, to Mr. Serurier, Aug. 23, 1834. MSS. Notes, France. Mr. Forsyth, Sec. of State, to Mr. Rogers, July 28, 1837. MSS. Dom. Let. Mr. Calhoun, Sec. of State, to Mr. King, July 25, 1844. MSS. Inst., France. Mr. Clayton, Sec. of State, to Mr. Cazenove, Feb. 25, 1850. MSS. Notes, Germ. Mr. Fish, Sec. of State, circular, Oct. 23, 1873. MSS. Inst., Arg. Rep.; Mr. Fish, Sec. of State, to Mr. Bristow, June 20, 1876. MSS. Dom. Let. Mr. Frelinghuysen, Sec. of State, to Mr. Nogueiras, Nov. 27, 1882. MSS. Notes, Portugal.

On the other land, there have been several cases in which extradition has been asked from a foreign state as an act of courtesy.

See Mr. Van Buren, Sec. of State, to Mr. Vaughan, July 21, 1829. MSS. Notes, For. Leg. Mr. Livingston, Sec. of State, to Governor of Canada, Aug. 1, 1831; *ibid.* Mr. Brent, Acting Sec. of State, to Mr. Porter, Sept. 6, 1828. MSS. Dom. Let. Mr. Marcy, Sec. of State, to Mr. Seibels, July 16, 1855. MSS. Inst., Belgium. Mr. Seward, Sec. of State, to Mr. McMath, Apr. 28, 1862. MSS. Inst., Barb. Powers. Mr. Evarts, Sec. of State, to Mr. Porter, Nov. 19, 1878. MSS. Dom. Let. Mr. Evarts, Sec. of State, to Mr. Welsh, Jan. 9, 1879. MSS. Inst., Gr. Brit. See App., vol. iii, § 268.

As to arrest and extradition of Tweed in 1876, without treaty, see Mr. Fish, Sec. of State, to Mr. Adee, Nov. 3, 1878; Mr. Fish to Mr. Cushing, Nov. 3, 1876; same to same, Dec. 8, 1876. MSS. Inst., Spain.

As to Surratt's arrest in Alexandria, in 1866, for the assassination of Mr. Lincoln, see Mr. Seward, Sec. of State, to Mr. Hale, Alexandria, Jan. 23, 1867.

As to consular power in eastern lands, see App., vol. iii, § 268.

"The law of nations embraces no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place."

Mr. Rush, Sec. of State, to Mr. Hyde de Neuville, Apr. 9, 1817; MSS. Notes, For. Leg. See Whart. Confl. of Laws, § 941; Whart. Cr. Pl. and Pr., § 38.

Unless there be treaty or legislative authority the President of the United States cannot call upon the governor of a State to surrender a fugitive criminal to another country.

Mr. Forsyth, Sec. of State, to Mr. Spencer, Aug. 7, 1839. MSS. Dom. Let.

In this letter the question of the relation of Federal and State governments as to extradition are discussed in detail.

"The undersigned must beg leave to differ entirely from M. de Argaïz in regard to the rule of law for delivering up criminals and fugitives from justice. Although such extradition is sometimes made, yet, in the absence of treaty stipulation, it is always matter of comity or courtesy. No Government is understood to be bound by the positive law of nations to deliver up criminals, fugitives from justice, who have sought an asylum within its limits."

Mr. Webster, Sec. of State, to Mr. de Argaïz, June 21, 1842. MSS. Notes, Spain.

"But the practice of nations tolerates no right of extradition. Whatever elementary authors may say to the contrary, one nation is not bound to deliver up persons accused of crimes who have escaped into its territories on the demand of another nation against whose laws the alleged crime was committed. The Government of the United States has from the very beginning acted on this principle. Mr. Jefferson, when Secretary of State under the administration of General Washington, declared that 'the laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming

within their pale, is received by them as an innocent man, and the have authorized no one to seize or deliver him.' It has been contrar to the practice of the United States even to request as a favor that th Government of another country should deliver up a fugitive from crin nal justice, because under our laws we possess no power to reciprocat such an act of grace. Since I came into the Department of State th President, after full deliberation with his Cabinet, refused for this reaso to prefer such a request to the Government of Texas. The truth is that it has been for a long time well settled, both by the law and prac tice of nations, that, without a treaty stipulation, one Government i not under any obligation to surrender a fugitive from justice to anothe Government for trial."

Mr. Buchanan, Sec. of State, to Mr. Wise, Sept. 27, 1845. MSS. Inst., Brazil.

In Argüelles's case, 1864 (cited in Whart. Confl. of Laws, § 941; Spea on Extrad., 1), the defendant was delivered to the Spanish Governmen by Mr. Seward without treaty, and the proceedings were so summar as to prevent a review on *habeas corpus*.

As sustaining Mr. Seward's view, see Washburn, *in re*, 4 Johns. Ch., 106.
As to good offices in such cases, when requested by a State, see Mr. Seward t Mr. Salgar, Mar. 30, 1865. MSS. Notes, Colombia.

Mr. Seward's course in the Argüelles case was supported by him i a letter to the House Judiciary Committee, June 24, 1864.

"The elaborate letter of Mr. Seward of June 24, 1864, to the chai nan of the Judiciary Committee of the House of Representatives (copy of which was inclosed in Mr. Seward's No. 108½ to Mr. Koerner o the same date) lays down and enforces the following affirmative propo sitions:

"1. That 'the object to be accomplished in all these cases is alike in teresting to each Government, namely, the punishment of malefactors– the common enemies of every society. While the United States affor an asylum to all whom political differences at home have driven abroad t repels malefactors, and is grateful to their Governments for under aking their pursuit and relieving us from their intrusive presence This doctrine, originally put forth by Attorney-General Cushing in a official opinion dated October 4, 1853, was quoted and adopted by Mr Seward.

"2. That 'the true portion of the national obligation and authorit for the extradition of criminals' may be found 'defined and establishe *by the law of nations.*'

"3. That 'this obligation and authority, under the Constitution o the United States, and *in the absence of treaty stipulations* and statutor enactments, rests with the President of the United States.'

"4. That 'the sole elements of consideration upon which the Ex ecutive is to determine whether or not a proposed case of extraditio

should or should not call forth the exercise of this power and duty under the law of nations, and the precepts of humane and Christian civilzaition' are 'the traits of the alleged criminality as involving heinous guilt against the laws of universal morality and the safety of human society and the gravity of the consequences which will attend the exercise of the power in question or its refusal.'

"Whether these propositions would or would not commend themselves to the judgment of the President, should a case arise for their application to a fugitive from justice from a state with whom we have no extradition convention, found within the jurisdiction of the United States, about which I express no opinion, it seemed clear that this Government was not in a position to dispute the right of Spain to apply them in Bidwell's case on the demand by Great Britain for his surrender."

Mr. Fish, Sec. of State, to Mr. Sickles, Apr. 30, 1873. MSS. Inst., Spain.
To same effect, see Mr. Fish to Mr. Beardsley, June 30, 1873. MSS. Inst., Barb. Powers.

"The well-considered reasons given by my predecessor, Mr. Seward, for the action of this Government in Argüelles's case would undoubtedly be presented by Spain as an answer to any representation that might be made by this Government as to the effect of the absence of an extradition treaty between Great Britain and Spain, and it is difficult to see how they could be avoided as a precedent."

Mr. Fish, Sec. of State, to Mr. Sickles, Apr. 30, 1873. MSS. Inst., Spain.

"A resolution," says Mr. Dana, commenting on Argüelles's case, "introduced into the House of Representatives, condemning the act * * * was rejected by a large majority, and the subject referred to a committee, but it was followed by no action of Congress."

Dana's Wheaton, *in loco*, § 115, note 73.

"I have the honor to acknowledge the receipt of your note of the 24th instant, in which, referring to a communication from the Department of Justice to this Department, which had found its way into the public newspapers, you express the opinion that it would render almost certain the refusal of this Government to accord the extradition of Carl Vogt, or Stupp, to the German Government, and you accordingly renew the request formerly made, that Vogt may be delivered up to Belgium as an act of comity.

"In the personal interview which I had with you on this subject, simultaneously with the reception of your note, I was able to inform you that this Government had already at that time taken into consideration whether, in the absence of a treaty with Belgium, the laws of the United States would permit the surrender of this criminal to your Government. I informed you at the same time that while the United States do not admit an obligation under the principles of international law, which are recognized by Governments, to surrender from within their

urisdiction and the protection of their laws a person accused of crime, n order that he might be tried by a different system of laws and jurisrudence, yet that, under the circumstances of this case, the Secretary f State had felt disposed to examine into the power to surrender Vogt o your Government as an act of comity.

"The result of that examination has, to say the least, raised grave oubts as to the power of the President to do so. The authority of the Executive to abridge personal liberty within the jurisdiction of the Inited States, and to surrender a fugitive from justice in order that he ay be taken away from their jurisdiction, is derived from the statutes f Congress, which confer that power only in cases where the United tates are bound by treaty to surrender such fugitives, and have a reiprocal right to claim similar surrender from another power. I am, herefore, constrained to decline to comply with your request for the urrender of Carl Vogt.

"I deem it proper to add, with reference to your remarks upon the pinion of the Attorney-General, that correspondence of this nature is egarded as domestic and confidential, and is not esteemed to be a roper subject of criticism or comment on the part of the representaves of other powers."

Mr. J. C. B. Davis, Acting Sec. of State, to Mr. Delfosse, July 28, 1873. MSS. Inst., Belgium; For. Rel., 1873.

"Some time since one William J. Sharkey, who was tried and conicted of murder in the city of New York, escaped to Cuba, and soon ade himself known to the police by his bad conduct in Havana.

"The authorities of New York, anxious to obtain his return to justice, ave, on several occasions, made applications to this Department for ssistance in reference to this question.

"Upon a careful review of all the facts, and considering our relations ith Spain, it was adjudged that in the absence of any treaty of extraition, this Government could not, with propriety, request the actual eturn of Sharkey to the State of New York.

"At the same time the officials of that State were informed that the overnment would place no obstacles in the way of his surrender, hould the Spanish officials on the island propose to order it.

"Some two months since Mr. Hall, in his No. 190, informed the Deartment that he was inclined to think that the authorities of Cuba ould make no objection to the delivery of Sharkey without the formalies of an extradition process.

"The Department, in reply thereto, under date of March 4 ultimo, nformed Consul-General Hall that it was deemed inexpedient for the overnment to make any formal application of that nature, but at the ame time, if the result could be accomplished, the Department would e greatly pleased to see this criminal delivered up to justice, and would

promptly communicate to the authorities of New York any information on the question."

Mr. Cadwalader, Acting Sec. of State, to Mr. Cushing, May 11, 1875. MSS. Inst., Spain.

"You will, however, in no event (in making claim for extradition on Chili) give the Chilian authorities an assurance that if they should comply with our request we would reciprocate if a similar request should be made of us."

Mr. Evarts, Sec. of State, to Mr. Osborne, Sept. 28, 1878. MSS. Inst., Chili. See same to same, July 3, 1879, where Mr. Osborne was instructed to use his "good offices" to obtain a surrender.

"In the absence of a formal treaty of extradition between this country and Portugal, it is clear that any steps looking toward the arrest of Angell and his return to this country for trial must rest on the spontaneous consent of the Portuguese Government, given in deference to the solicitation of that of the United States. It is presumed that the Government of His Majesty will have no difficulty in acceding to the prevalent opinion in respect of extradition, that it is a right inherent in the sovereignty of a nation and not born of specific treaty obligations, while on the other hand the right to claim the extradition of a criminal flows exclusively from the reciprocal stipulations of treaty."

Mr. Evarts, Sec. of State, to Mr. Moran, Nov. 19, 1878. MSS. Inst., Portugal. See, however, Mr. Evarts, Sec. of State, to Mr. Shishkin, June 18, 1879, Dec. 7, 1879. MSS. Notes, Russia.

The effect of the act of Congress of August 3, 1882, and September 25, 1882, regulating emigration, while it may sometimes, incidentally, place a criminal in the reach of the law officers of his country, cannot be considered as designed for that end, or as committing this Government to any duty in the nature of extradition.

Mr. Frelinghuysen, Sec. of State, to Mr. Willamov, Oct. 27, 1882. MSS. Notes, Russia.

In Senate Ex. Doc. 98, 48th Cong., 1st sess., is President Arthur's message of January 13, 1884, on Trimble's case, containing the following report from Mr. Frelinghuysen, Secretary of State:

"The undersigned has the honor to acknowledge the receipt of Senate resolution dated February 11, 1884, requesting certain information in regard to the case of Alexander Trimble, an American citizen whose extradition has recently been demanded by the Government of Mexico, for crimes alleged to have been committed by him in that Republic, from whose justice he is said to have fled and sought an asylum in the United States.

"In response to the said resolution, the undersigned submits the following statement:

"On the 31st of January last the consul-general of the United States informed the Secretary of State, by telegram dated at Laredo, that the

Mexican authorities demanded the extradition, and stating that th surrender would be dangerous as a precedent not provided for by treaty On the same day the Secretary of State answered, calling attention t the sixth article of the treaty with Mexico, adding that this clause ha been held to be mandatory, and that under it an American citizen i not subject to surrender; and at the same time he telegraphed the gov ernor of Texas to this effect, and later he informed the governor furthe by telegraph that the action of the Secretary of State was based upo the belief, supported by an almost uniform course of decisions, that th President had no power in the premises; but that the question being one of importance, if any further arrests should be made and the evi dence be found to be sufficient to warrant extradition aside from th question of citizenship, the case in the first place would be left to th determination of the local authorities, the President requiring, however that before any actual surrender the accused should have full oppor tunity for a hearing before the Supreme Court of the United States on a writ of *habeas corpus* and *certiorari* from a local court, either Federa or State.

"In the mean time and before this last telegram the United State marshal telegraphed the undersigned from Austin, stating that th prisoner had been surrendered by the extradition agent to one of hi deputies, and asking what authority he had for holding him, and whether he should release him. The undersigned informed the marsha that if Trimble was an American citizen he was not subject to extradi tion, and could not lawfully be held for that purpose.

"On the same day, having received a further telegram from the gov ernor of Texas, and representations having been made at this Depart ment by the Mexican minister, the undersigned telegraphed the marsha to hold the prisoner pending the consideration of these representations unless he had already been discharged; and on the night of that day the marshal replied that he had been discharged.

"In view of the importance of the question, the undersigned deemed it his duty to inform the President fully in regard to the matter, and accordingly, on the 4th instant, submitted to him a report of the case, of which the following is a copy:

"The question to be considered is not whether the President is *bound* to extradite an American citizen on a requisition made by the Republic of Mexico—the treaty expressly states that he is not so bound—but the question is whether the President has the *power* under the treaty to extradite an American citizen. The treaty, in the first article, says:

"'It is agreed that the contracting parties shall, on requisitions made in their name through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in article third of the present treaty, committed within the jurisdiction of the requiring party, shall seek an asylum or shall be found within the territories of the others.'

"And in the sixth article says:

"'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.'

"It has been claimed that by the comity of nations, even in the absence of statute law or treaty, the President is authorized to surrender any one found within the United States against whom a case was satisfactorily made of having been guilty of a crime in the country making the demand. The authorities show that it is one of the doctrines or principles of international law, that by comity criminals should be surrendered by one nation to another. Nations with which we had no extradition treaty have, on several occasions, acting on this principle, made surrender to us of criminals. And it is further claimed that there is no impracticability in the President's exercising, as may the Executives of other nations, this power of extradition, as the Constitution declares that he shall execute the laws, and that such duty is not confined to executing the statute law of the United States, but all laws, and especially that international law which has reference to the relation of nations, with which subject the Executive is charged.

"This position is supported by at least one authority. In 1864, José Augustin Argüelles, while lieutenant-governor of the district of Colon, in Cuba, had sold into slavery a number of negroes who had been taken from a captured slave-trader and liberated. Argüelles then fled to the United States, and was, by Mr. Seward, given up to the Spanish Government in the absence of an extradition treaty. In his report to President Lincoln, submitted to the Senate May 31, 1864, Mr. Seward said:

"'There being no treaty of extradition between the United States and Spain, nor any act of Congress directing how fugitives from justice in Spanish dominions shall be delivered up, the extradition * * * is understood by this Department to have been made in virtue of the law of nations and the Constitution of the United States.'

"While I have stated the claim that is put forth as to the President's power under the law of nations and the Constitution in the absence of statutes or treaties, I find a long and almost uniform course of decisions, which, while not denying the international doctrine stated, holds that the President, in the absence of legislation and treaty, has not the power to enforce that doctrine. Some of these decisions I cite: * * * (Here follow authorities elsewhere cited in this section.)

"An examination of the extradition treaties between the United States and other countries shows the following to contain the sentence, 'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty," being the same as that contained in the Mexican treaty:—Treaty with Austria, December 15, 1856; Baden, May 19, 1857; Bavaria, November 18, 1854; Belgium, May 1, 1874; Belgium, November 20, 1882; Hanover, May 5, 1855; Hayti, July 6, 1865; Japan, May 26, 1875; Mexico, June 10, 1862; Netherlands, July 30, 1880; Peru, July 27, 1874; Prussia and other

German states, June 1, 1853; Spain, February 21, 1877; Sweden an Norway, December 21, 1860.

"Abbott's National Digest, 508:

"'The law of nations does not give a foreign Government a right to demand of tl Goverument of the United States a surrender of a citizen as subject of such foreig Government, who has committed a crime iu his own country, and is afterwards foun within the limits of the United States. Such a right can only be claimed under treaty stipulation. (4th Circ. [Va.], 1835; case of José Ferreira dos Santos, 2 Brock Marsh., 493. See also U. S. *v.* Davis, 2 Sumn., 482; 1 Op., 510; 2 *ibid.*, 559.)

"'[The international extradition] of fugitives from justice is a duty of comity, nc of strict right, and it is the settled policy of the United States not to make such extr dition except in virtue of express stipulations to that effect. (6 Op., 85. See als 1 *ibid.*, 18; 3 *ibid.*, 661.)' * * *

"In 1874 Francisco Perez, a Mexican, murdered Joseph Alexande an American, residing at Brownsville, Tex., and escaped into Mexic It was the purpose of this Government to have Perez sent back fc trial on this side the frontier, and the instruction from Mr. Fish to M Foster states that though this, under the treaty, could not be expecte as a matter of right, and would not be asked as a matter of favor c even accepted as such with any understanding that it would be recij rocated by us, still Mr. Foster was authorized to apply to the Mexica Government, making known all the circumstances, and submittin whether they were not such as to warrant a voluntary surrender of th party, if this could in any case be done. October 3, 1874, Mr. Foste reported that the Mexican Government declined to surrender Perez and Mr. Fish, in acknowledging this dispatch, remarked that it was no surprising that the Mexican Government so acted, especially as it ha a technical right to refuse the request.

"Alexander Jalinsky, a Russian subject, charged with embezzlemen of money and securities from the custom-house at Lardomis, in th Russian dominions, was alleged to have taken refuge in the Unite States. Mr. Evarts states that, as no treaty of extradition exists be tween the two Governments, the absence of any general provisions o United States law directing and defining the functions of the Execu tive in respect to the surrender of a person charged with the commis sion of crime in the territories of a foreign power, and alleged to be fugitive from the justice of any country with which no treaty of extra dition has been concluded, appears to involve the necessity of a declen sion on the part of the United States to accede to an application of th character made by Mr. Shishkin. Mr. Evarts adds that the delay i answering Mr. Shishkin has not been unaccompanied with a hope that either by the action of a co-ordinate branch of the Government or othe wise, it might become possible to treat the application for extraditio with a more favorable consideration.

"Thus it appears that, by the opinions of several Attorneys-General by the decisions of our courts, and by the ruling of the Department c State, the President has not, independent of treaty provision, the powe

of extraditing an American citizen, and the only question to be considered is whether the treaty with Mexico confers that power.

"By the treaty with Mexico proclaimed June 20, 1862, this country places itself under obligations to Mexico to surrender to justice persons accused of enumerated crimes committed within the jurisdiction of Mexico who shall be found within the territory of the United States; and further provides that that obligation shall not extend to the surrender of American citizens. The treaty confers upon the President no affirmative power to surrender an American citizen. The treaty between the United States and Mexico creates an obligation on the part of the respective Governments, and does no more, and where the obligation ceases the power falls. It is true that treaties are the laws of the land, but a statute and a treaty are subject to different modes of construction. If a statute by the first section should say: The President of the United States shall surrender to any friendly power any person who has committed crime against the laws of that power, but shall not be bound so to surrender American citizens, it might be argued, perhaps correctly, that the President had a discretion whether he would or would not surrender an American citizen. But a treaty is a contract, and must be so construed. It confers upon the President only the power to perform that contract. I understand the treaty with Mexico as reading thus: The President shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States.

"Such being the construction of the treaty, and believing that the time to prevent a violation of the law of extradition was before the citizens left the jurisdiction of the United States, I telegraphed the governor of Texas that an American citizen could not legally be held under the treaty for extradition.

"It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power.

"On further reflection, in view of the fact that fourteen of our treaties with other nations contain provisions identical with that contained in our treaty with Mexico, and impressed also with the fact that the safety and peace of society on the frontier would be greatly injured if criminals, because citizens of this country, could here find an asylum and go unpunished, I concluded that the question was one of too much importance to be settled by the dictum of any individual, but should receive judicial determination, and to this end I telegraphed the officers to hold the accused until they received other direction. The accused had, however, after my first telegram, been discharged.

"I now propose to inform the officers in Texas, who, subject to the supervision of the President, are authorized to determine whether a surrender of the accused should be made, that if another arrest is made and a case of guilt is made out the President will not, on the ground of citizenship, interfere with an order of surrender if such be made,

but requires that the accused be informed that if he or they wish hearing before the Supreme Court of the United States on *habeas co pus* as to the power of the President in the matter of extradition, or to the true construction of the treaty before the surrender be actual made, every facility for such hearing will be afforded. Should the cou hold that the President has a discretionary power of extraditing citize proven guilty of crime, the evil apprehended will not be realized, a should the court hold that the President has the power to extradi only when bound by treaty to do so, Congress can then, if it should its pleasure, by statute confer the discretionary power.

"The foregoing summary gives the present condition and status of t case."

Mr. Frelinghuysen, Sec. of State, Report of Feb. 13, 1884.

"A long and almost unbroken course of decisions has established as a rule of executive action not to grant the surrender of fugiti criminals except in pursuance of a treaty."

Mr. Bayard, Sec. of State, to Mr. Davie, May 29, 1886. MSS. Dem. Let.

In Robbin's case (Whart. St. Tr., 392; Bee's Rep., 266), the extradition w after treaty, but before legislation by Congress. This case, in its gene relations, is discussed *infra*, § 271*a*. See Spear on Extrad., 53; and see Memoirs J. Q. Adams, 400, and 1 Phill. Int. Law (3d ed.), 544.

As denying the right to extradite without treaty, see Santos' case, 2 Brec 493. See also Adriance *v.* Lagrave, 59 N. Y., 110; Com. *v.* Hawes, 13 Bu 697; letters from Mr. Lawrence, 15 Alb. Law J., 44; 16 *ibid.*, 365; 19 *ibi* 327; Revue de droit int., x, 285; Lawrence's com. sur droit int., iv, 3 The question is considered in detail in Short's case, 10 Serg. & R., 125.

In a homicide case, where it appeared that a shot had been fired fro an American vessel in the harbor of a foreign port, killing a person board a foreign vessel lying in the port, and the prisoner was acquitt on account of want of jurisdiction of the case, it was ruled that it w not the duty of the court, there being no treaty stipulations with t foreign country, to send back the offender to the foreign Governmer whose laws he had violated, that he might be tried.

U. S. *v.* Davis, 2 Sumn., 482.

Certain British seamen being charged with piracy committed on boa a British vessel, contrary to acts of Parliament, the offense not bei piracy under the law of nations, and being imprisoned under a warra issued from the Secretary of State at the request of the British minist under the treaty of 1842, it was held that the prisoners might be a rested and surrendered without any special act of Congress to carry t treaty into effect. It was further held that without legislation as to t means of enforcing the treaty the prisoners might be examined, and, probably guilty, be ordered into custody, with a view to surrender. was held, also, that the order of surrender might be signed by the Se retary of State and issued from the State Department.

Case of the British prisoners, 1 Woodbury and Minot, 66.

The restrictions in article 4 and article 5 of the amendments to the Constitution of the United States do not apply to the subject of extradition, as regulated by convention and by statute. Nor does such in convention, construed as covering the case of a crime committed before the treaty was made, a bill of attainder, or an *ex post facto* law, within the meaning of Article I, section 9, of the Constitution of the United States.

Giacomo, *in re*, 12 Blatch., 371.

If a Spanish subject who has violated the territorial law of Florida be within the United States, and a demand be made for his surrender, he ought to be given up for trial and punishment; and a law should be made directing the mode of procedure.

1 Op., 68, Lee, 1797.

The President has no power "to make the delivery" unless under treaty or act of Congress.

1 Op., 509, Wirt, 1821; 3 Op., 661, Legaré, 1841.

The jewels of the Princess of Orange were stolen, and having been brought into this country in violation of the revenue laws, were seized by the customs authorities. It was advised that, as their rightful owner had done nothing to subject them to forfeiture, the person who brought them into this country having obtained them fraudulently, without her knowledge and against her will, they were not liable to condemnation, but stood on the same footing as property cast upon our shores by the violence of the winds and waves, and were entitled to the same protection. It was also advised that there being sufficient evidence (there was no other claimant) that they belonged to the princess, the President might order the district attorney to discontinue the prosecution, and direct the marshal having the jewels in charge to deliver them over to the minister of the Netherlands.

2 Op., 482, Taney, 1831.

As it is the settled policy of the United States not to make such extradition, except in virtue of express stipulations to that effect, the United States ought not to ask for extradition in any case as an act of mere comity.

6 Op., 85, Cushing, 1853.

The duty to extradite is not to be inferred from the "favored nation" clause in treaties, relating to commerce and navigation.

6 Op., 148, *ibid.* See also 1 Op., 68, Wirt, 1821; 3 *ibid.*, 681, Legaré, 1841; 6 *ibid.*, 431, Cushing, 1854; 14 *ibid.*, 281, Williams, 1873; *supra*, § 134.

As to arrest of criminals in uncivilized lands, see *supra*, § 17*b*.

As to extradition to Great Britain under treaty of 1842, see President's message, transmitting letter from the Secretary of State relative to. May 12, 1884. House Ex. Doc. 156, 48th Cong., 1st sess. For other documents see report of Committee on Foreign Affairs. House Rep. 701, 45th Cong., 2d sess.; and Senate Rep. 82, 47th Cong., 1st sess.

Anderson's case and proceedings before Court of King's Bench in 1866 are stated in Senate Ex. Doc. 11, 36th Cong., 2d sess.

II. *DEMAND CONFINED TO TREATY OFFENSES.*

§ 269.

The rule, *expressio unius est exclusio alterius*, applies to extraditio treaties; and under such treaties process can be sustained only fc enumerated offenses. This, however, would not preclude in extrao dinary cases, and an appeal, not on the basis of the treaty but on th ground of comity, for surrender of a fugitive charged with a non-enı merated offense, when such offense is one which would justify such a extraordinary measure.

Mr. Jefferson's reasons, in instructions of March 22, 1792, to Messrs. Carmicha and Short, for limiting extraditable offenses to murder, are given in 1 An St. Pap. (For. Rel.), 258.

It is true that at one time a different view was held. Thus, in 179(the Secretary of State (Mr. Pickering) "expresses his concurrence wit Mr. Liston (British minister at Washington) in the opinion that whil the reciprocal delivery of murderers and forgers is expressly stipulate in the 27th article of our treaty with Great Britain, the two Goverı ments are left at liberty to deliver other offenders as propriety an mutual advantage shall direct. * * * The Attorney-General ha just called, and thinks the opinion expressed to be correct." (Mr. Pick ering to the President, June 3, 1796. MSS. Dom. Let.) In a lette of same date to the governor of Vermont, Mr. Pickering says: "Th reciprocal delivery of murderers and forgers is positively stipulated b the 27th article of the treaty; the conduct of the two Governments wit respect to other offenders is left, as before the treaty, to their mutu discretion, but this discretion will doubtless advise the delivery of cu prits for offenses which affect the great interests of society. The Pres lent approves of this opinion and of the communication of it to you excellency."

MSS. Dom. Let.

The correspondence with Great Britain in regard to the interpret tion of article 10 of the treaty of 1842 will be found in Brit. and For. S Pap., 1844–'45, vol. 33, 892 *ff*. These documents include the opinion c Mr. Nelson, Attorney-General of the United States (4 Op., 201), Augus 7, 1843, elsewhere referred to, in the case of Christiana Cochran, de manded by the British Government, and the proceedings in Britton' case, in which the following opinion was given by the Attorney an Solicitor General:

"1st. The offenses for which a party may be apprehended under thi act are distinctly specified in the first section of it. They are all offense known and recognized by the criminal law of this country, and the mag istrate should issue his warrant upon the same description of evidenc as he would require in case the crime had been alleged to be committe in this country.

"2d. We are of opinion that papers or documents professing to be c proved to be the original depositions are not admissible under the secon section of the act, without the certificate of the magistrate who issue the warrant.

"3d. We think they ought to be connected with the warrant, as copie ought to be, by a certificate from the party issuing it.

"4th. We think copies are not admissible unless certified to be so under the hand of the person issuing the warrant, and attested, by the oath of the party producing them, that they are true copies.

"5th. There can be no doubt that the words 'original warrant,' in the second section, mean the warrant issued in America; but, in order to justify the apprehension of an offender under this act, it does not appear to us to be necessary that any warrant, by the authorities in America, should be produced here; such production is not required by the first section of the act, which gives the justices here the power to apprehend. The second section applies merely to the evidence of the guilt; and if the depositions are offered in evidence before a magistrate here, then the certificate of the magistrate abroad, who took the depositions and issued his warrant upon them, becomes necessary to render them admissible.

"6th. We think a magistrate may act upon the depositions, &c., if they would constitute an offense here, without proof that the offense charged is an offense in the foreign country.

"7th. We think that the depositions may be received in evidence before the apprehension of the party.

"FREDERICK POLLOCK.
"W. W. FOLLETT."

"Temple, November 24, 1843.

In the Brit. and For. St. Pap. for 1844–'45, vol. 33, 893, will be found further correspondence between the United States and Great Britain on the subject of extradition.

As to meaning of "infamous offenses" in treaty of 1869, see *supra*, § 152.

The convention for extradition between the United States and Bavaria of 1853 was not abrogated by the operation of the constitution of the German Empire, adopted in 1871, as affecting the further independent existence of Bavaria.

Thomas, *in re*, 12 Blatch., 370. *Supra*, §§ 136 *ff*.

Extradition cannot be demanded of France by the United States in the case of a breach of trust in the State of California made grand larceny by the laws of that State.

7 Op., 643, Cushing, 1856.

Although robbery on the lakes is piracy within the meaning of the treaty with Great Britain of 1842, yet where the parties engaged in certain outrages on Lake Erie were guilty of robbery and assault with intent to commit murder, the Secretary of State was advised, in view of the disputed question of piracy on the lakes, that their extradition should be demanded at the hands of the Canadian authorities for the latter offenses.

11 Op., 114, Bates, 1864.

A public officer of the United States who embezzles moneys of the United States intrusted to his care, and escapes from justice to the territory of France, is liable, under the extradition treaty with France of 1843, to be returned to this country for trial.

12 Op., 326, Stanbery, 1867.

"On the 24th of April [1792], the Secretary of State forwarded t Messrs. Carmichael and Short, to be submitted to the Spanish Court he project of a convention for the mutual rendition of fugitives fro ustice between the United States and the Spanish territories *borde ng on them.* The plan had been drafted by the Secretary, and receive he approval of the President. It provided for the giving up of person who had committed willful murder, not of the nature of treason; for th recovery of debt from fugitives, in the courts of justice established i the States or provinces where the fugitive was found; for the recovery n like manner, from the fugitive or his representatives, of property o ts value, carried away, or of damages sustained by forgery. But in n case was the person of the defendant to be imprisoned for debt. Th draft was accompanied by a paper assigning heads of reasons both fo ts provisions and seeming omission. The exile necessarily incurred b a fugitive was regarded as a sufficient punishment for most offenses A single extract is given to exhibit the spirit of the paper:

"'*Treason.*—This, when real, merits the highest punishment. Bu most codes extend their definition of treason to acts not really agains one's country. They do not distinguish between acts against the *Gov ernment*, and acts against the *oppressions of the Government*, the latte are virtues, yet they have furnished more victims to the executione than the former, because real treasons are rare, oppressions frequent The unsuccessful strugglers against tyranny have been the chief martyr of treason laws in all countries.

"'Reformation of Government with our neighbors, being as muc wanted now as reformation of religion is, or ever was anywhere, w should not wish, then, to give up to the executioner, the patriot wh fails and flees to us. Treasons, then, taking the simulated with th real, are sufficiently punished by exile.'"

2 Randall's Life of Jefferson, 53.

III. *TRIAL TO BE ONLY FOR OFFENSES ENUMERATED IN TREATY.*

§ 270.

The general rule, embodied in several treaties, and sustainable as principle of international law, is that when a fugitive is delivered on specific charge, he cannot be tried for an offense which is not enumerate as among those for which extradition would have been granted, or fo which (as the rule is sometimes stated) extradition would not have bee granted if asked.

Lawrence's case was as follows:

Lawrence was surrendered in 1875 on the charge of forgery, the de mand being made on March 4, 1875. When arraigned in New York o several indictments, charging separate forgeries, he pleaded speciall that he had been extradited for a particular forgery, and that he coul not be tried for any other forgery. The United States filed a rejoinde stating, among other things, "that by the laws of Great Britain an of the United States, as well as by the practice of both parties to th treaty, no limitation exists as to the number and character of the o fenses for which a party extradited may be tried." It was held b Judge Benedict, in March, 1876 (U. S. *v.* Lawrence, 13 Blatch., 295) that the plea was no bar. Mr. Fish, Secretary of State, in reply t Lord Derby's statement that the Government of the United States in tended "to try Lawrence for other than the extradition crime," sai

"that the Government of the United States had never reached any such conclusion, nor formed any such intention." (Mr. Fish to Mr. Hoffman, For. Rel., 1876, 243.) According to a statement by Mr. Bliss, district attorney at the time, "care was taken that Lawrence should not be arraigned upon, or asked to plead to, any charge, except the indictment for the forgery" on which the extradition was granted. Lawrence ultimately pleaded guilty to this charge. (See Spear on Extradition, 120.) But compare qualifying statements in Lalor's Cyclopedia, &c., art. Extradition.

The following documents relate to this and kindred cases and the principles they involve:

"A conversation occurred on the 17th instant, between Sir Edward Thornton and myself, in reference to the course which might be adopted by the British Government on a demand being preferred for the extradition of Winslow on the charge of forgery.

"Sir Edward suggested that if his surrender were requested it might be refused, unless a stipulation was entered into that the fugitive should not be tried upon any offense other than that for which he was extradited.

"Whether this course, if adopted, grows out of the proceedings in the Lawrence case, or from a desire to make the extradition treaty between the United States and Great Britain subject to the provisions of the British extradition act of August 9, 1870, I cannot say.

"You will remember that this act, in section 3, under the head of 'Restrictions on surrenders of criminals,' provides that no criminal shall be surrendered unless provision is made by the law of the foreign state, or by arrangement, that the fugitive shall not be tried for any offense 'other than the extradition crime proved by the facts on which the surrender is grounded.'

"If the course adverted to be caused by the Lawrence case, it may be well to say that it is believed that Lawrence has not, up to this time, been arraigned for any other than the extradition offense, and that no representation has been made to this Government on the question.

"If such a course is taken for any other reason, it may be said that Great Britain has on more than one occasion tried surrendered criminals on offenses other than those for which they were extradited, and such trials afford a practical construction of the scope of the treaty and of the power and rights of either Government as understood and applied by Great Britain for a period of nearly thirty years after the ratification thereof, and I cannot imagine that it will be claimed by Great Britain that either party to a treaty may at will, and by its own municipal legislation, limit or change the rights which have been conceded to the other by treaty, and have been practically admitted for such length of time.

"I would also call your attention to the twenty-seventh section of the act of 1870 (ch. 52, 33, 34, Vict.), repealing former acts under which extradition had theretofore been made. This section expressly excepts

everything contained in the act inconsistent with the treaties referred to in the repealed acts, among which is the treaty with the United States. It seems to have been clearly the intent of Parliament not to apply to that treaty any of the provisions of the act inconsistent with the treaty, as it had existed and been enforced for nearly thirty years.

"While I hope that no such demand will be made as intimated, you will object to any such stipulation being asked, and, should it be insisted upon, you will decline to give it, and, if necessary, telegraph the Department for further instructions."

Mr. Fish, Sec. of State, to Mr. Schenck, Feb. 21, 1876. MSS. Inst., Gr. Brit. For. Rel., 1876.

"Referring to previous correspondence in reference to the extradition of Winslow, in custody in London, I have now to acknowledge the receipt of your No. 39, under date of March 10, inclosing a note addressed to you by Lord Derby, of March 8, and your reply of the same day.

"With General Schenck's No. 884, was inclosed a note from Lord Derby, dated February 29, in which it was stated that Her Majesty's secretary of state for the home department had drawn attention to subsection two of the third section of the British extradition act of 1870, and feared that the claim by this Government of the right to try Lawrence (who had been recently surrendered) for crimes other than that for which he had been extradited amounts to a denial that any such law as is referred to in the British act exists, and the disclaimer of this Government of the existence of any implied understanding in respect to trials for crimes other than extradition crimes, together with the interpretation put upon the act of Congress of August 12, 1842 (which is doubtless an error for 1848), preclude any longer the belief in the existence of an effective arrangement which Her Majesty's Government had previously supposed to be practically in force, and it was added that the secretary of the home department was compelled to state that if he were correct in considering that no such law exists, he would have no power in the absence of an arrangement, to order the extradition of Winslow even although proper proceedings had been taken for that purpose.

"Lord Derby called General Schenck's attention to the intimation which he had received from the home department, and requested that the matter be brought to the knowledge of this Government.

"It is to be remarked, however, that in this note the foreign office, as distinguished from the home office, expressed no opinion on the question involved, but confined itself to requesting that the views of the home office might be communicated to this Government.

"A few days later, however, on the 8th of March, Lord Derby assumed the more advanced position previously occupied only by the home department, and writes as follows: 'Her Majesty's Government do not feel themselves justified in authorizing the surrender of Winslow until

they shall have received the assurance of your Government that this person shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offense committed prior to his surrender other than the extradition crimes proved by the facts on which the surrender would be grounded,' and requesting that this decision be communicated to this Government.

"To his note you made reply under date March 8, referring to the general practice for many years under the treaty, and calling attention to the construction given to the twenty-seventh section of the act of 1870 in the case of Bouvier.

"No further correspondence has reached this Government, and the matter rests upon this note of Lord Derby and your reply.

"The reasons given by Lord Derby for the course intimated in his note arise, as he states, from what has taken place in this country in the Lawrence case, and the positive terms of section three, subsection two, of the British extradition act of 1870.

"Moreover, it has been stated that the home office had even gone further, and expressed the opinion that, not only had some implied understanding been reached as to the particular crime for which Lawrence should be tried, but that it would be in violation of the law of the United States, and of the general laws of extradition of all countries, to try any prisoner for any other crime than the particular extradition offense for which he had been surrendered.

"With regard to any such understanding, either expressed or implied by any authorized declaration or engagement of this Government, no evidence is adduced; none can be adduced. This Government asked the surrender of Lawrence, precisely as it has asked the surrender of all other fugitives who have been delivered by Great Britain under the treaty of 1842, complying on its part with the requirements of the treaty; and neither by expression nor by implication entering into any 'arrangement,' but simply requiring the fugitive to be 'delivered up to justice.' It furnished such evidence of criminality as, according to the laws of Great Britain where the fugitive was found, would have justified his apprehension and commitment for trial if the crime or offense had been there committed.

"Great Britain recognized the compliance by this Government with all that the treaty required, and delivered the fugitive up to justice.

"The allusion made by the home office to the case of Lawrence needs possibly a passing remark.

"Charles L. Lawrence is charged with a series of forgeries whereby the Government of the United States claims to have been defrauded to an amount not far short of two millions of dollars on custom-house entries. He is supposed to have numerous and influential confederates, both in this country and in England, who are suspected of having

shared in the spoils resulting from these alleged frauds upon this Government.

"A large number of indictments have been found against Lawrence, and proceedings either civil or criminal are either pending or imminent against supposed accomplices. It is supposed that prosecution of these cases might possibly disclose names on either side of the Atlantic, in connection with the alleged frauds, not yet brought before the public.

"In the spring of 1875 Lawrence fled and escaped to Europe, and was arrested, under the assumed name of Gordon, at Queenstown, on a requisition for his surrender under the treaty. There were proved (as I am informed) before Sir Thomas Henry, in London, twelve or thirteen distinct charges of forgery, each on papers connected with a different invoice of goods. The representatives of this Government supposed the extradition was made on all the charges; but the letter or report of Sir Thomas Henry to the British home office led to the issue of a warrant of surrender of Lawrence on the single charge of forging a bond and affidavit, on which warrant the keeper of the jail delivered Lawrence to the agent appointed by the President to receive him; the terms of the warrant were not known to any agent or officer of this Government (as I represented to me) until long after Lawrence's return to the United States. His counsel and friends appear to have been apprised of the fact that, although proof was presented on some twelve or thirteen charges of forgery, the warrant of surrender seems to be confined to the forging a bond and affidavit. Up to this date Lawrence has been arraigned only upon one indictment, based on the forgery of the bond and affidavit mentioned in Sir Thomas Henry's report to the home office, and he has not been arraigned for any offense other than the extradition crimes proved by the facts in evidence before Sir Thomas Henry, and on which his surrender was based.

"Although not arraigned on any other indictment than for the forgery for which he was extradited, the British home office has raised the question that he may possibly be tried upon other charges and for other crimes.

"It seems, therefore, that the home office of Great Britain undertakes to decide what is the law of the United States, as well as of Great Britain, and assumes that the law of the United States, as well as general law of extradition and the extradition act of Great Britain, prevents the trial of a criminal surrendered under the treaty of 1842 for any offense other than the particular offense for which he was extradited; and the position which it takes involves the assumption that, in demanding an extradition under the treaty, the United States is bound by the provisions of the act of 1870, whether in conflict with the treaty or not, and it claims to have 'supposed' that an 'effective arrangement was in force' that no criminal so surrendered should be tried for any other than the particular extradition offense; on the faith of which arrangement it is claimed that surrenders have heretofore been made, and without which

it is now said that a surrender would not be possible under an English act; but, as already said, nothing is adduced in support of the belief of the existence of such supposed arrangement.

"These positions are so different from the understanding of this Government, and so opposed to the views which it was supposed were entertained by Great Britain, and which have been recorded in parliamentary papers, which have been asserted in diplomatic correspondence, and been recognized in judicial decisions in that as in this country, and set forth by writers on extradition law, that I learn from Lord Derby's note, with surprise equal to my regret, that they appear to be supported by the foreign office.

"The act of August 12, 1848, reproduced in the Revised Statutes (§§ 5270 to 5276), referred to in the correspondence, does not affect or limit the rights of the two Governments on the question.

"This act is simply a general act for carrying into effect treaties of extradition. It provides the machinery, and prescribes the general mode of procedure, but does not assume to determine the rights of the United States, or of any other state, which are governed wholly by the particular provisions of the several treaties, nor to limit or construe any particular treaty.

"In some few treaties between the United States and foreign countries provisions exist that the criminal shall not be tried for offenses committed prior to extradition, other than the extradition crime, and in others no such provision is included.

"Again, under some treaties, the citizens or subjects of the contracting powers are reciprocally exempt from being surrendered, while others contain no such exception. The United States act of 1848 is equally applicable to all these differing treaties. If the surrendered fugitive is to find immunity from trial for other than the offense named in the warrant of extradition, he must find such immunity guaranteed to him by the terms of the treaty, not in the act of Congress. The treaties which contain the immunity from trial for other offenses have been celebrated since the date of the act of 1848.

"At that date the United States had treaties of extradition only with Great Britain and with France, neither of which contained the limitation referred to.

"The terms of the respective treaties alone define or can limit the rights of the contracting parties.

"The construction of the treaty between the United States and Great Britain, by the two Governments, and their practice in its enforcement, for many years were in entire harmony. In each country surrendered fugitives have been tried for other offenses than those for which they had been delivered; the rule having been that, where the criminal was reclaimed in good faith, and the proceeding was not an excuse or pretense to bring him within the jurisdiction of the court, it was no violation of the treaty, or of good faith, to proceed against him

on other charges than the particular one on which he had been surendered. The judicial decisions of both countries affirm this rule. It ras so held in a case of interstate extradition by Judge Nelson, in Villiams *v.* Bacon, 10 Wend., 636, and the same principle was laid own by the court of appeals of New York, in a late case of Adriance . Lagrave, who had been delivered up under the treaty with France. n United States *v.* Caldwell (8 Blatch. C. C., 131), Caldwell, after extradition from Canada for forgery in 1871, was indicted for bribing an fficer; and the plea was entered that the prisoner was brought within he jurisdiction of the court upon a charge of forgery, under the treaty, nd that the offense specified in the indictment was not mentioned in he treaty. A demurrer being interposed, the court decided the prisner had been extradited in good faith, charged with the commission f a crime, and must be tried.

"In the case of Burley, extradited from Canada on a charge of robery, the prisoner was tried on assault with intent to kill.

"In the case of Heilbronn, who was extradited from this country for rgery, and tried in Great Britain for larceny, the facts, as stated by ie solicitor-general of Great Britain, who had charge of the proceedigs, and who was examined before the late British commission on the xtradition question, were, that the prisoner being extradited for forery, was acquitted, and was thereupon tried and convicted for larceny, n offense for which he would not have been surrendered, not being numerated in the list of crimes mentioned in the treaty.

"In Canada there is the same current of authority.

"In the case of Von Earnam (Upper Canada Reports, 4 C., p. 288) the risoner was surrendered by the United States to Canada upon the harge of forgery, and application was made for release on bail on the round that the offense was, at most, the obtaining of money under alse pretenses and not within the treaty. Macauley, C. J., said, in deying the motion, that he was disposed to regard the offense as forgery, ut even if the offense were only false pretenses, after 'being in cusody he is liable to be prosecuted for any offense which the facts may upport.'

"In Paxton's case (10 Lower Canada Jurist, 212; 11, 352) the prisoner ras charged with uttering a forged promissory note. He pleaded that e had been extradited upon the charge of forgery, and could not be ried for uttering forged paper, or for any other than the extradition ffense. The court decided that the trial should proceed. The prisoner herenpon protested against being called upon to plead to any other harge than that for which he was extradited, but he was tried, found uilty, and the conviction affirmed on appeal.

"In addition to the foregoing, Judge Benedict, in his opinion in Lawence's case, delivered within a few days past, entirely coincides in these iews, and the Solicitor-General of the United States, in his opinion in awrence's case, dated July 16, 1875, reaches the same conclusions.

"An examination of the report of the select committee on extradition of the House of Commons, which sat in 1868, under whose superintendence the extradition law of 1870 was framed, and which was composed of some of the most distinguished public men of Great Britain, among whom were the solicitor-general, Mr. Mill, Mr. Forster, Sir Robert Collier, and Mr. Bouverie, shows that the law of the United States, and the practice in regard to extradition were perfectly well understood, and they are distinctly referred to several occasions.

"Mr. Hammond, now Lord Hammond, for many years under secretary of state, in speaking of Burley's case, stated, that as it was suggested that the prisoner, who had been surrendered on a charge of robbery, was about to be tried for piracy, the matter had been referred to the law-officers of the Crown, and that it was held that if the United States put him *bona fide* on his trial for the offense for which he was extradited, it would be difficult to question their right to try him for piracy, or any other offense of which he might be accused, whether such offense was or was not a ground of extradition, or even within the treaty; and added, 'We admit in this country that if a man is *bona fide* tried for an offense for which he was given up, there is nothing to prevent his being subsequently tried for another offense, either antecedently committed or not.' (Answer 1036.)

"Mr. Mullens, an eminent member of the bar, who was counsel in the Lawrence case, in reply to a question of Sir Robert Collier, said that, in his opinion, a surrendered criminal ought not to be tried for an offense other than the extradition offense arising from the same facts; and Mr. Forster (question 1214), considering the propriety of the proposed stipulation, that a person should be tried for no offense other than the extradition offense, said:

"'The Americans do not make that stipulation, or else you would not have been able to try Heilbronn for another offense.' To which Mr. Mullens responded: 'No; there is no stipulation of that kind in the case of America.'

"Mr. Mill thereupon said (question 1216):

"'As I understand it, the treaty with America would not prevent our trying a man for a different offense from that for which he had been given up.' To which Mr. Mullens replied: 'It would not; there is no stipulation that he shall not be tried for any other offense.' Then follows question 1217, 'Would you wish to extend that state of things to other countries?' and the reply, 'With regard to America I have never found any difficulty about it,' etc.

"So far as can be ascertained there was absolutely no dissent at any time from these views as to the law and practice under the treaty, and the only question seemed to be whether it was wise to attempt to change them.

"Mr. Clark (an eminent British authority), in his Treatise on Extradition, says:

"'It is quite clear that neither the treaty nor the law of the United States contains the provisions of the extradition act of 1870.'

"It would appear, therefore, by the judicial decisions, by the practice f both Governments, and by the understanding of the persons most miliar with proceedings in such cases, and the most competent to dge, that where a criminal has been in good faith extradited for an ffense within the treaty, there is no agreement, express or implied, at he may not also be tried for another offense of which he is charged, though not an extradition offense. He is, in fact (in accordance with e language of the treaty), 'delivered up to justice;' and in the abence of any limitation by treaty, to "justice" generally; each independent State being the judge of its own administration of justice. Surely, reat Britain will not allow the legislature of another State to prescribe to limit the cases, or the manner in which justice is to be administered in her courts, and she will not expect the United States to be less nacious of its independence in this regard.

"Now, for the first time since the signing of the treaty of 1842, Great ritain raises the question of her right to demand from the United tates, as a condition of the execution by Great Britain of her engagement to surrender a fugitive criminal charged with a series of stupenous forgeries, a stipulation or agreement not provided for in the treaty, t asked on the ground that an act of Parliament, passed some twenty-ght years after the treaty had been in force, prescribes it as one of the les or conditions which should apply to arrangements for extradition, hen made with a foreign state.

"This involves the question whether one of the parties to a treaty can ange and alter its terms or construction or attach new conditions to s execution without the assent of the other—whether an act of the arliament of Great Britain, passed in the year 1870, can change the pirit or terms of a treaty with the United States of nearly thirty years' nterior date, or can attach a new condition, to be demanded of the nited States before compliance by Her Majesty's Government with the rms of the treaty, as they have been shown to have been uniformly nderstood and executed by both Governments for the third of a century.

"As this Government does not recognize any efficacy in a British statte to alter or modify or to attach new conditions to the executory parts f a previously existing treaty between the United States and Great ritain, I do not feel called upon to examine particularly the provision f the law of 1870. But inasmuch as Great Britain seeks to impose the rovisions of that act upon the United States in the execution of a treaty f many years' anterior date, I do not fail to observe that, while by the ct Great Britain assumes to require that no surrendered fugitive shall e tried in the country which demands his extradition for 'any offense ther than the extradition crime' (in the singular), proved by the facts n which the surrender is grounded, she reserves to herself the right to y the fugitive surrendered to her for such crimes (in the plural) as may e proved by the facts on which the surrender is grounded.

"This does not seem to be wholly reciprocal, and if the United States were disposed to enter into a treaty under this act, it might expect some greater equality of right than a cursory examination of this provision in the act seems to provide.

"It is quite well known that after the passage of the act of 1870 an effort was made to enter into a treaty with Great Britain which should enlarge the number of extradition offenses and otherwise extend the provisions of the existing treaty.

"At the outset it was apparent that the act of 1870 was not an act to carry into effect treaties or conventions for extradition, as is the United States act of 1848, but one providing a system to which all subsequent treaties of extradition must be adapted, and which could be applied to enforce treaties or arrangements made subject to its provisions.

"This Government was unable to agree to any arrangement based on the provisions of the act of 1870, and in a note addressed to Sir Edward Thornton, the British minister, under date of January 27, 1871, he was informed that 'this Government understands the twenty-seventh section of the extradition act of 1870 as giving continued effect to the existing engagements for the surrender of criminals. Imperfect as they are, in view of the long conterminous frontier between British North America and the United States, we must be content to suffer the inconvenience until Parliament shall put it in the power of Her Majesty's Government to propose a more comprehensive and acceptable arrangement.'

"The British Government was thus distinctly and formally advised of the position and of the views of the United States, and no exception thereto has been expressed.

"A further effort to effect a treaty was made in 1873, after the passage by the British Parliament of an act amending the act of 1870, which resulted in failure, for precisely similar reasons.

"This failure to negotiate a new treaty arose solely because the United States could not accept as part of it some of the provisions of the act of 1870, and preferred to go on under the treaty of 1842, as theretofore construed, and practically carried into effect by each Government; and thus we have proceeded up to the present time.

"In support of the construction which this Government in 1871, in the note to Sir Edward Thornton above referred to, gave to the twenty-seventh section of the extradition act, it appears that when the Court of Queen's Bench was called to pass upon the very question, in the case of Bouvier (27 Law Times, N. S., 844), the attorney-general stated that the intention had been to make a general act, which should apply to all cases except where there was anything inconsistent with the treaties referred to. So far as the point was passed on, the lord chief-justice expressed the opinion that it was the intention, while getting rid of the statutes by which the former treaties were carried out, at the same time to save those treaties in their full integrity and force, and that the result

ad been accomplished. One of the other justices thought the question omewhat doubtful, and the third agreed with the chief-justice.

"The Solicitor-General of the United States, in his opinion in Lawnce's case, given in August of last year, reached the same conclusion, iat the treaty was not affected by the act.

"It cannot readily be believed that Parliament intended by the act of 870 to claim the right to alter treaties in existence without notice to ie other Government, or to impose new conditions upon foreign Governents seeking extraditions under treaties in existence prior to that act.

"The United States has declined to become subject to the British ct of 1870, and with knowledge of this the Government of Great Briin has continued constantly to ask and to obtain extraditions under ie treaty of 1842, and since the refusal of the United States to negoate a new treaty under the provisions of that act.

"Since the passage of the act of 1870 Great Britain has obtained from iis Government some thirteen warrants of extradition, and has instiited a much larger number of proceedings to obtain extradition. In o instance has Great Britain thought it necessary to tender any such ipulation as she now asks from the United States, or to present her equests for extradition in any way different from that in which they ere presented prior to 1870. The United States in the same time have istituted numerous proceedings, and at this moment have three crimials in London in custody upon charges of forgery, whose extradition iis Government is seeking in the usual manner provided by the treaty.

"During this period no intimation has reached this Government that ie treaty of 1842 was not in full force, or that the act of 1870 was laimed to limit its operation, or to impose upon this Government the ecessity either of changing its laws or of giving stipulations not known o the provisions of the treaty, and not heretofore suggested, nor has ny representation been made to this Government, by that of Great ritain, on account of any proceedings taken in the case of Lawrence, ientioned in the opinion attributed to the home office, in the note of ord Derby to General Schenck, before referred to.

"But now, with three important cases pending in London at the presnt time for extradition, in one of which, at least, all the formalities ave been complied with, we are informed in substance that it had been ipposed up to the present time by the British home office that our law s to trials for other than extradition offenses was in agreement with ie law of 1870; but finding it to be otherwise, we are confronted with ie requirement of a stipulation in order to obtain what is guaranteed y the treaty of 1842, whereby the United States must recognize the ght of the British Parliament, by statute, to change existing executory eaties, and to impose upon this Government conditions and stipulaons to which it had not given its assent.

"As relates to the particular case of the fugitive Winslow, there is ot, so far as I am aware, any intention of trying him for any offenses

other than those on which indictments were transmitted, and for which his surrender was demanded; but the United States will give no stipulation of which the treaty does not authorize the demand.

"As the stipulation or condition is demanded by Great Britain as a right, the right of the demand must be established.

"The President regrets that a condition which, in his judgment, is without any justification under the treaty should have been asked. He regards the question thus presented as of a grave and serious character, on the final solution of which must probably depend the continuance of the extradition article of the treaty of 1842. He cannot recognize the right of any other power to change at its pleasure, and without the assent of the United States, the terms and conditions of an executory agreement in a treaty solemnly ratified between the United States and that power. He thinks that the twenty-seventh section of the British act of 1870 was specially intended to exempt the treaty with the United States from the application of any of the new conditions or provisions embodied in that act, and to leave that treaty to be construed, and the surrender of fugitives thereunder to be made, as had been previously done.

"He hopes that, on a further consideration, Her Majesty's Government will see, in the section referred to, the effect which he supposes it was designed to have.

"But he recognizes that it is for the British Government to construe and enforce its own statutes; and should Her Majesty's Government finally conclude that the British Parliament has attached a new condition to the compliance by that Government of its engagement with the United States under the tenth article of the treaty of 1842 relating to extradition, requiring from the United States stipulations not provided for or contemplated in the treaty, he will deeply regret the necessity which will thereby be imposed upon him and does not see how he can avoid regarding the refusal by Great Britain to adhere to the provisions of the treaty as they have been reciprocally understood and construed from its date to the present time, or the exaction by that Government of a condition heretofore unknown, as the infraction and termination of that provision of the treaty.

"You are not authorized to enter into any stipulation or understanding as to the trial of Winslow, in case he be delivered up to justice. His surrender is asked under and in accordance with the provisions of the tenth article of the treaty between the United States and Great Britain of the 9th of August, 1842. He is charged with a crime included within the list of crimes enumerated in the treaty; that crime was committed within the jurisdiction of the United States, and he has sought an asylum and been found within the territories of Great Britain, and the United States have produced such evidence of his criminality as according to the laws of Great Britain would justify his apprehension and

commitment for trial if the crime or offense had been committed i Great Britain.

"You will communicate the substance of this to Lord Derby, and should he desire it, you may read it to him.

Mr. Fish, Sec. of State, to Mr. Hoffman, Mar. 31, 1876. MSS. Inst., Gr. Brit. For. Rel., 1876.

"[Telegram]

"LONDON, *April* 27, 1876.

'FISH, *Secretary, Washington:*

"If Winslow gets before Queen's Bench on *habeas corpus*, am I to em ploy counsel? Shall not intervene unless instructed.

"HOFFMAN, *Chargé.*"

"Counsel on *habeas corpus* seems impracticable in present conditio of the case. You will present to Lord Derby copy of eight sixty-fou with a note referring to your previous oral communication thereof, an stating that you do so under instructions, in a final hope of still pre serving the treaty, and in the further hope that he may see therein suf icient cause to prevent the discharge of Winslow, and to order his sur render under the tenth article of the treaty of eighteen forty-two, i accordance with the requisition of this Government.

"You will further state, in substance, that although the United State does not recognize the statute of eighteen seventy as controlling extra lition under our treaty, still, as Great Britain claims to be governe thereby, you hope that his lordship will see in the twelfth section au thority for his intervention to cause the surrender in accordance wit the treaty."

Mr. Fish, Sec. of State, to Mr. Hoffman (telegram), Apr. 28, 1876. For. Rel., 187

"I have the honor to acknowledge the receipt of your note of th 13th instant, informing me, at the request of the governor-general c Canada, that one Maraine Smith, late of Detroit, was committed as fugitive from justice in the county of Essex, Ontario, upon the 4t of April last, and, as the usual application for his surrender, under th extradition treaty, had not been received, that upon the 4th of June h will be entitled to claim his discharge.

"Upon the 11th ultimo the governor of Michigan addressed me stating that the person referred to, after an examination, had been com mitted for the crime of murder, and was held to await extradition, an requested that the proper steps be taken for that purpose.

"The case had not been brought to the attention of this Departmen prior to that time.

"As Her Majesty's Government, at the time of the receipt of thi communication, had already informed the United States that Winslo and other fugitive criminals, then in British jurisdiction, in whose case the necessary steps had been taken, and who had been committed fc extradition, would not be surrendered pursuant to the stipulations c

the 10th article of the treaty of 1842, it was deemed advisable to desist from preferring applications for extradition in new cases until the final decision of Her Majesty's Government on that question should be reached, and the governor of Michigan was informed of this conclusion.

"While, therefore, requesting you to express the thanks of this Government to his excellency the governor-general for his courtesy in furnishing the information referred to, I have to request that you will inform him of the reason why no formal request has been preferred in this case pending the decision of Her Majesty's Government in the Winslow and other cases now before it."

Mr. Fish, Sec. of State, to Sir E. Thornton, May 17, 1876. MSS. Notes, Gr. Brit.; For. Rel., 1876.

"Your No. 79, under date of May 6, inclosing a copy of a note addressed to you by Lord Derby, in relation to the extradition of Winslow, bearing date May 4, reached me late on the 17th instant.

"This note of Lord Derby's on its face is a reply to a note from you to him, wherein you communicated the general purport of an instruction addressed by me to you, under date of the 31st of March last; but on the 29th of April last you had given to Lord Derby a copy of the instruction of 31st of March. His lordship's note of the 4th of May is therefore taken as a reply to that instruction, although it contains allusion to some expressions in your note which were not there in pursuance of your instruction.

"If Her Majesty's Government had simply persisted in a refusal to deliver Winslow and the other criminals now in custody awaiting extradition, for the reasons heretofore given, it would have been unnecessary to prolong discussion, inasmuch as the distinct and definite refusal of this Government to give any assurance or stipulation not called for by the treaty, or to admit the right of Great Britain to exact from the United States stipulations foreign to the treaty, as a condition of the performance by Great Britain of her obligations, had already been communicated to Lord Derby.

"But as the note in question assumes to give the grounds on which the refusal to surrender the criminals is based, and in large measure seems to change those previously assumed, and as the United States cannot assent to the accuracy of many of the statements made, or to the inferences drawn therefrom, it seems necessary that some reply should be made.

"In my instruction of the 31st of March last, reference was made in detail to numerous cases decided in the courts, and to evidence from various sources, alike British and American, including the testimony of British officials best versed in extradition law, the opinions of British Crown lawyers, the published decisions of British courts and British writers upon extradition law, that where a criminal was in good faith demanded for one offense within the treaty, and surrendered therefor,

here was no agreement, understanding, nor practice that he might not be placed on trial for another offense with which he was charged, in addition to the extradition crime.

"Lord Derby does not explain, modify, or deny that the whole current of authority is to this effect, but meets the point with the assertion that there is no case within the knowledge of this [the British] Government in which a prisoner was surrendered by England for one offense, and tried by the United States for a different one,' and states that the case of Heilbronn was a 'private prosecution,' and that no evidence can be found of the attention of the Government having been called to it. In a subsequent passage he again speaks of 'private prosecutions,' to which the attention of the Government has not been called. I am at a loss to appreciate the application of the term 'private' to the prosecution of a felony in the name and behalf of the state or sovereign. If, however, it means no more than what is claimed when it is said that the attention of the Government had not been called to a particular case, the question arises as to that jealous protection of individual and personal rights which is the just pride of British as it is of United States laws, and which constitutes so large a part of Lord Derby's note. The alleged criminal in whose behalf the state has exercised its sovereign power, whom it has seized and brought from a distant land under solemn treaty obligations, is especially entitled to be looked after by the state, and be protected in such rights as belong even to the criminal.

"If Lord Derby's theory that the prohibition of the trial of a surrendered fugitive, for other than the specific crime for which he had been delivered, be correct, either as a recognized principle of the general or international law of extradition (if there be any such agreement between nations on the subject of extradition as to form what can be regarded as 'international law'), or as implied in the treaty of 1842, when a surrendered fugitive is, under such international law (if such it be), or under such treaty, placed in the hands of the receiving Government with the highest obligations of honor, of justice, and of international faith to protect that fugitive from any other prosecution than such as that Government claims that he is liable to.

"The fugitive is surrendered to the Government in its political capacity, and if he be subjected to any prosecution against which he has a right to immunity, the Government into whose especial charge and guardianship he has been surrendered for a specific purpose violates its faith and neglects its duty, both to the individual surrendered and to the state which surrendered him. On the theory advanced by his lordship, the surrendered fugitive must look to the state in its political character—what Lord Derby calls 'the Government'—for his protection; and that power, call it state or government, cannot escape its responsibility by the plea of ignorance, and that its attention had not been called to the case.

"Heilbronn was a fugitive crimigal demanded by Great Britain under the treaty of 1842, on the charge of forgery, and was accordingly delivered up by the United States to British justice. He was tried for forgery before a British court and acquitted, and was thereupon indicted and tried for a public offense not named in the request or warrant of extradition, and one not included in the treaty, and he was thereof convicted.

"If, under British jurisprudence, no public prosecutor is provided to enforce her law against criminals surrendered on a demand made upon a foreign state, and the duties of a prosecutor are discharged by an individual not technically a servant of the Crown, but permitted to assume that office, can the Government of Great Britain claim or expect that the regular proceedings in her courts can be disavowed by the political branch of the Government as not having been brought to its attention, or that such proceedings form no element in determining what has been the practice of the two Governments under the treaty?

"Heilbronn's case was not referred to as an exceptional one, but as one of the numerous instances all tending to prove the unbroken practice and understanding of the two Governments.

"In addition to Heilbronn's and the other cases heretofore referred to by me, there are other and recent decisions of distinguished British judges directly upon the point, and in full harmony with the views maintained by the United States.

"Mr. Justice Ramsay, in the case of Israel Rosenbaum, in the supreme court of Canada, in 1874, when the discharge of the prisoner was claimed because there was no prohibition under the laws of the United States against the trial of criminals for offenses other than those for which they were extradited, as was required by the act of 1870, says:

"'If it were recognized as a principle of international law that a prisoner extradited could only be tried for the crime for which the extradition took place, it would not have been necessary for the Imperial Parliament to make these provisions (alluding to the provisions of the act of 1870), and adds, 'I am not, however, aware that it has been laid down in England, that a man once within the jurisdiction of English courts could set up the form of his arrest, or the mode by which he came into custody, as a reason for his discharge when accused of crime;' and the same was substantially held in the case of Worms, extradited from Canada within the last few weeks.

"It is not the province of any Government to make inquiry into the extent of knowledge which the political department of another Government may have as to the practice or the administration of justice in its courts in reference to extradition, but I have alluded in prior instructions to the uniform practice, without dissent or objection, in both countries under the treaty of 1842, and have shown that it was common in both countries, and that it was held by high judicial decisions in both,

hat a prisoner, extradited in good faith for an extradition crime, migh lso be tried for another crime.

"Lord Derby, in his note, again refers to the provisions of the act o Congress of August 12, 1848, as showing that persons delivered u could not be tried for any offenses other than those for which they wer surrendered; although in my former instructions I stated that the Unite States district court, and the Solicitor-General, acting in the place o he Attorney-General, had each separately decided precisely the oppo ite. The construction of the municipal laws of a state pertain to tha tate, and not to other Governments.

"In the United States, a treaty, duly ratified and exchanged, is th upreme law of the land, and its provisions are binding without legisla ion. It becomes convenient, however, from time to time to enact law o regulate the general course of proceedings arising under one or a ariety of treaties; but such legislation is purely internal and munici al.

"The act of 1848 recognizes the fundamental doctrine that the sur ender of a fugitive criminal is a political act of the Government, and he function of the court or magistrate is only to determine whether a ase has been made out in accordance with the treaty or the statut nacted in aid of its enforcement. It neither adds to nor detracts from he obligations created by the treaty, and is not essential to the execu ion by the United States of its engagements under the various extra ition treaties into which this Government has entered, but affords a onvenient and satisfactory aid in the administration of those obliga ions.

"When the United States, by the twenty-seventh section of the treaty f 1794, in much the same language as the present treaty, engaged to eliver up fugitives, no act whatever was passed, but fugitive criminals, evertheless, were given up on the demand of Great Britain under that rovision of the treaty.

"In like manner when the tenth article of the treaty of 1842 went into ffect, no statute was needed, but six years thereafter (in 1848) the act a question was passed as being thought advisable to provide machin ry to carry out all treaties providing for extradition, not only with reat Britain, but with all Governments with which the United States ad and might have treaties, no matter what may be their particular rovisions.

"Of these treaties, some, as I have said, contain restrictions as to the rimes for which a criminal may be tried by the state demanding him, nd others are silent on the question; but the act applies to all.

"Lord Derby, in his note to you, contends that the British extradition ct of 1870 imposed no new condition upon the treaty of 1842, but in is note of April 13 he refers to the condition 'which Her Majesty's overnment are compelled to require under section 3, subsection 2, of he act of 1870.'

"When it is proposed to engraft, whether by implication or by act of Parliament, upon an existing treaty, a provision not expressly contained therein, I may be permitted to look into the debates in the British Parliament in 1866, when it was proposed to amend a bill to carry into effect the treaty with France, by requiring a stipulation similar in its purport to that now asked of the United States, and there find that his lordship, at the time Lord Stanley, and then, as now, Her Majesty's secretary of state for foreign affairs, opposed the amendment, saying that 'in a case like this, international courtesy demanded that the treaty should not be materially altered without communication with the other party.'

"In the same debate, Lord Cairns, then attorney-general and now lord chancellor, said that the bargain was made between the sovereigns, and the amendment 'proposed to introduce a new ingredient into the bargain which did not exist at the time the bargain was made. It might have been unreasonable that this new ingredient had not been introduced at the beginning, but to introduce it now was simply to break the bargain which the sovereigns had made and Parliament had ratified; it was to infringe upon treaty engagements, and that without notice to the other side.' And further, and in particular reference to the latter part of the amendment, quite similar to the provisions of the act of 1870, now under discussion, he said, 'to put such words into an act of Parliament, which did not exist in the treaty, would only be offering a gratuitous insult to the foreign power to whom it applied, without securing any real advantage.' The amendment was withdrawn.

"The treaty between Great Britain and France, which was the subject of that debate, was, like that between Great Britain and the United States of 1842, silent as to an inhibition of the prosecution of a surrendered fugitive for other than the specific offense for which he was given up. The proposition in Parliament thus sternly and honestly denounced and defeated as 'discourteous,' as 'breaking a bargain,' as 'infringing upon treaty engagements,' as 'a gratuitous insult to a foreign power,' and as 'securing no real advantage,' is, nevertheless, what it is now claimed has been done by virtue of the act of 1870 with regard to the United States.

"Her Majesty's Court of Queen's Bench in Bouvier's case, and more recently the courts in Canada, have substantially held the same high doctrine which the eminent statesmen whom I have cited not long since announced in their places in Parliament. Neither international law nor international courtesy have changed the principles on which they were then recognized as resting.

"The United States adheres to the position announced in my former instruction, that it will recognize no power to alter or attach conditions to the executory parts of an existing treaty, to which it is a party, without its previous assent.

"Lord Derby seems to imagine some want of reconciliation betweer he views of the United States upon this extradition question and those sserted in its behalf on the rights of political asylum, and asks what s to prevent the United States from obtaining a prisoner on one charge nd trying him for a political offense. The answer is ready:

"The inherent, inborn love of freedom, both of thought and of action, ngraved in the hearts of the people of this country so deeply that no aw can reach and no Administration would dare to violate.

"A large proportion of those who sought refuge on our shores prior o the formation of this Government sought this country for the enjoyment of freedom of opinion on political and religious subjects, and their lescendants have not forgotten the value of an asylum nor the obligation of a state to shelter and protect political refugees. Neither the xtradition clause in the treaty of 1794 nor in that of 1842 contains ny reference to immunity for political offenses, or to the protection of sylum for political or religious refugees. The public sentiment of both ountries made it unnecessary. Between the United States and Great Britain it was not supposed on either side that guarantees were required f each other against a thing inherently impossible, any more than, by he laws of Solon, was a punishment deemed necessary against the rime of parricide, which was beyond the possibility of contemplation.

"That a sentiment stronger than written law has been sufficient to prevent any attempt to infringe on this right, it is but necessary to recall the political events occurring in England, in Ireland, and in the United States since the treaty of 1842 has been in force, the attempted nd actual rebellions which have been witnessed, and the consequent exodus of parties engaged, and yet not a demand by either Government pon the other for the surrender of a fugitive for a political offense. In his respect, what has been must continue to be.

"Careful as this Government has been and will be to maintain the right of asylum for political and religious refugees, it is mindful of the luty to its own citizens and to society at large devolving upon a state o visit punishment upon offenders against the laws—a duty in no way ntagonistic to the preservation of the right of asylum.

"The rights of society and the duties of the state in the punishment f criminals should not be narrowed and unduly restricted upon the ague suggestion or fear that at some time some political criminal may e placed in jeopardy.

"The duty of Government to protect its own citizens and punish rime is equally a duty with that of affording hospitality and shelter to olitical offenders from abroad.

"The Government of the United States sees no reason why either hould be sacrificed to the other, any more than why all criminals should scape for fear some political offender may suffer.

"His lordship believes that the only test and safeguard for the liberty f the individual and the maintenance of the right of asylum are to be

found in the principle for which he contends, that the crime or crimes of which a man is accused in the country surrendering, and for which he is surrendered, are the only crimes for which he ought to be tried in the country claiming.

"Differing with his lordship, I think that the liberty of the individual and the right of asylum would be equally guarded (independently of any reliance on common principles and on the good faith of both nations) by a treaty providing that a surrendered criminal shall be tried for none other than one of the several crimes enumerated in the treaty, and for which each Government is willing to surrender. The fugitive would thus be effectually protected against trial for a political offense, justice would be more effectually administered, and crime be allowed less chance of escape.

"The United States would not object to such limitation in any treaty which it may be called upon to negotiate with a foreign state. But, with the limitation proposed by Lord Derby, it is possible that if a criminal be surrendered on a charge of murder, and if the evidence developed on the trial establish only manslaughter, he might consequently escape; or if one be charged with assault with intent to kill, and after the issuing of the requisition or of the warrant the victim dies, it is doubted whether in this case, under the common law of England, which obtains also in most of the United States, the fugitive could be convicted of assault, etc., and not having been surrendered for murder, the doctrine contended for would protect him from trial on such charge.

"I should not here again advert particularly to the British act of 1870 but that Lord Derby's note seems to invite some examination of its provisions, and that he alludes to the abortive efforts made since its enactment to negotiate a new treaty of extradition between the United States and Great Britain, and (as he seems to claim) under its provisions.

"In 1870 Great Britain had three treaties of extradition—with France, Denmark, and the United States.

"Owing to difficulties presented by British law, the treaty with France had been, at least between 1843 and 1866, practically a dead letter; the treaty with Denmark has (as has been represented) rarely been resorted to, if at all.

"The English practice as to extradition has been with the United States under the treaty of 1842. What that practice had been I have shown.

"Great Britain at this time determined to establish a system of extradition, applicable to all Governments, for her convenience, and in order to save the difficulty which had been experienced in obtaining the assent of Parliament, or in providing the means of carrying out a treaty, and in substance proposed to define under what limitations and conditions extradition ought to be and might be had.

"It was her right to propose a system and to invite foreign states accede to her views and make treaties thereunder. The general syste however, was anomalous. It applied the same restrictions to a Chri tian or a non-Christian state, and left no opportunity to suit a partic lar treaty to the particular demands of two Governments. Soon aft the passage of the act of 1870, a proposition was made to the Unit States to make a treaty thereunder, and after some examination t proposition was declined.

"In 1873, an amendatory act was passed, and further applicati being made, a negotiation was inaugurated.

"Difficulties were experienced at the outset, and at every stage, gro ing out of the system which had been adopted and the inflexible cha acter of the provisions of the act. Various drafts were from time time prepared at the British foreign office, and discussed, with an effo to reach an agreement. In these drafts it was proposed that a crimin should not be tried for any offense committed prior to his surrend other than the particular offense on account of which his surrender w made; and while an effort was made to extend the right to try a crin nal to any of the extradition crimes named in the treaty, and to a higher crime than that for which he was surrendered, the effort w abandoned because the United States was informed that under the a a provision was inadmissible by which an offender surrendered for o offense named in the schedule could be tried for any other than the e tradition crime. The negotiation was continued, however, until Jun 1874, when the United States reached the conclusion that a treaty cou not be negotiated under the act.

"That this Government ever reached or expressed the opinion th this act was the embodiment of what was the general opinion of countries on the subject of extradition, is far from correct.

"On the contrary, the United States was and is of the opinion that, the provisions in a treaty placing limits on the right of a foreign sta to try extradition criminals are chiefly inserted to protect political r ugees, it amounts to a surrender of criminal justice to that principle limit the right to a trial for the single particular crime named in t warrant of extradition, but that a proper limitation might be made providing that the criminal shall be tried for no political offense, a for no crime not an extradition crime.

"Such is understood to be the provision in almost all the Fren treaties negotiated with European powers; such was substantially t provision in the treaty negotiated between Great Britain and France 1852, and such is the express provision inserted in the treaty negotiat between the British island of Malta and Italy in 1863, and approved Great Britain.

"From the earliest period this Government has had occasion to c sider the questions arising under extradition law; the Articles of C federation having extradition provisions, as has the Constitution of

United States, governing the question between the States of the Union; and while the United States do not profess to lay down rules of international law on this question, this Government does not consider it now for the first time, nor has its jurisprudence been silent in developing the system. In the negotiation referred to, the attention of the Government of the United States was directed to the proposed treaty more than to the act, looking to its provisions as binding on the Government of Great Britain, entirely irrespective of the act in question.

"But many of the provisions of the act did not, and do not, seem to be reciprocal, and appear to furnish excuses for a failure to perform an obligation imposed by a treaty made thereunder, or a shelter for a responsibility which naturally belonged to the Government.

"In view of the position assumed by Great Britain during this controversy, by which treaty provisions are practically made subservient to acts of Parliament, the difficulty and want of reciprocity in making any treaty thereunder become more apparent.

"It is not my intention to attempt to critically examine this British statute, but it will not be inappropriate to refer to some of these provisions.

"Her Majesty's Government reserves to itself the right by section 2, after an arrangement has been made with a foreign state, by the order in council applying the act, or by any *subsequent* order to 'limit the operation of the order,' to restrict the same, and to 'render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.'

"Again, section 2, subdivision one, provides that a fugitive criminal shall not be surrendered for a political offense, 'or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas corpus*, or to the secretary of state, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.' In substance, therefore, the criminal may take two appeals from the decision of a police magistrate on this question, and, provided he succeeds on any application, he may be discharged; but no provision is made for an examination of the question in any quarter, should the police magistrate decide in favor of the criminal. In such event a question, which is purely one for the Government to deal with, is remitted to a police magistrate, and should he improperly decide, the Government is sheltered by a *quasi* judicial decision, and this of an officer not necessarily of a high grade.

"Again, section 2, subsection three, provides that a fugitive criminal shall not be surrendered unless provision is made by law in the foreign state, or by arrangement, that he shall not, until he has had an opportunity of returning, etc., be tried 'for any offense committed prior to his surrender, other than the extradition crime, proved by the facts on which the surrender is grounded.'

"It will be seen the word 'crime' is carefully used, in the singul and, as Lord Derby states in his note, this Government was inform in 1870 that any provision would be inadmissible by which a prisor surrendered for one offense could be tried for any 'other than the tradition crime for which he was surrendered.'

"But when the corresponding provision limiting Great Britain trials is examined (section 19), it is provided that a criminal so s rendered 'shall not be triable or tried for any offense committed pr to the surrender in any part of Her Majesty's dominions, other *than sı of the said crimes as may be* proved by the facts on which the surrenc is grounded.'

"The want of reciprocity of these provisions is quite clear, inviti frequent questions and difference.

"To make one further remark as to this act, the latter part of secti 7 provides that if the secretary of state is of opinion that an offense one of a political character, he may refuse an order for a warrant apprehension, and that he may 'at any time order a fugitive crimin accused or convicted of such offense, to be discharged from custody.'

"In the drafts of treaties prepared and submitted to this Gove ment under this act, no such corresponding authority to dischar criminals in custody was proposed to be given to the United Stat nor does the act seem to contemplate a reciprocal right to other powe

"I repeat, that this act does not concern the United States, except so far as it is put forward to limit our treaty rights, and I have be drawn into any consideration of its system, or particular provisic only from the language of Lord Derby, that it was the embodiment the general opinion of all countries on the subject of extradition.

"Moreover, if the United States had been willing to negotiate a n treaty, which should contain certain restrictions as to trials not includ in the existing treaty, and give certain advantages not known there such readiness could not justify Great Britain, after the negotiation h failed, in withholding all the advantages and in seeking to ingraft up the old treaty such of the rejected provisions as she might select; p ticularly so when the act of Parliament of 1843 (6 and 7 Vict., ch. was by its provisions to continue as long as the treaty; and the twen seventh section of the act of 1870 exempted the treaty with the Unit States from the clauses which were foreign to its terms, and when t United States, soon after the passage of the act of 1870, and on Ja ary 27, 1871, had informed Her Majesty's Government that this Gove ment understood the twenty-seventh section of the act of 1870 as giv continued effect to the existing engagements for the surrender of cri nals, to which no dissent was at any time or in any form or manner pressed. In fact, the understanding of the Untited States on this qu tion was not only not dissented from, but has been sustained by supreme court of Canada in Worms's case in 1876, and in Rosenbau case in 1874, where the court states: 'I cannot see how a new pro

ion of the act of 1870 could be consistent with the treaties with France, the United States, and Denmark;' and by the conclusion, so far as a conclusion was reached, by the Court of Queen's Bench in the case of Bouvier, in 1872, to which I have heretofore referred, where the lord chief-justice says that, although he hesitates to express an opinion, he plainly sees that it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force, and that, had it been necessary to decide that point, he would have been prepared to do so.

"Having examined that case with care as to what was there decided, I read with surprise Lord Derby's statement that the point decided was that, under the provisions of the French treaty, unless it had been proved to the court that the French law had provided that Bouvier could not be tried for any other offense than that for which he was surrendered, Bouvier could not have been delivered up; and I am quite satisfied that a perusal of the case itself will tend to a very different conclusion.

"Lord Derby makes reference to certain correspondence between an official of the home office and the solicitors of Lawrence soon after his surrender, and before any representation had been made to this Government. This correspondence assumed in a few words to prejudge and dispose of the whole question, and to state what was the law of this country, and the general law of extradition of all countries, in reference to the trial of surrendered fugitives. It was unknown to and unauthorized by this Government, and founded on the representation and the argument of the criminal. It appeared in the public prints, and was used by the counsel and friends of Lawrence in the United States to prejudge the question and create difficulty between the two Governments; and I deeply regret the necessity which requires me to question the reference to *ex parte* representations made by the paid solicitors of a criminal to an official of a foreign power in the discussion of a grave question involving the rights and impugning the conduct of a friendly state, and jeoparding the maintenance of a treaty of long standing and of beneficial operation.

"Lord Derby also quotes a letter of instruction addressed by the Attorney-General of the United States to the district attorney at New York in reference to the trial of Lawrence, whose case in the whole correspondence seems to have overshadowed that of Winslow, which alone is the subject of the present requisition made by the United States upon Her Majesty's Government, and his lordship inquires as to the power of the Attorney-General over prosecutions instituted against extradited criminals.

"The letter in question was addressed by the head of the Department of Justice to one of his subordinate officers in reference to the conduct of a case under his charge. The Attorney-General directs that 'Lawrence must be first tried upon the charge upon which he was extradited, and upon no other, until that trial is ended.' This letter of instruction,

passing from a superior to a subordinate officer, was not, and was n intended to be, an exposition of the views of the Government upon ar general proposition, but a specific instruction in a particular case; ar whether or not he had ever examined the opinion of the late disti guished under-secretary of state for foreign affairs of Her Majesty Government, he seems to have been guided by the same appreciatic of treaty rights and of international law which led Lord Hammond, his examination before the special committee of the House of Common to say: 'We admit in this country that if a man is *bona fide* tried f an offense for which he was given up, there is nothing to prevent h being subsequently tried for another offense, either antecedently cor mitted or not.'

"In reply to the question of Lord Derby as to the power of the A torney-General over prosecutions, it will be borne in mind that in tl United States an offense may be against Federal laws, or against tl laws of one of the States. The Attorney-General has power to contr all criminal prosecution for offenses against the Government pending the Federal courts, but no power whatever to interfere, directly or i directly, in any State prosecution. The President has, in like manne power to pardon criminals convicted, and to direct the suspension dismissal of criminal prosecutions in the Federal courts, but none pardon those tried and convicted in the State courts, or to control tl proceedings of these courts.

"Criminals of both classes come under the extradition treaty. It ha pens that Lawrence is charged with crimes against the Governmen and Winslow and the other forgers with crimes against State laws.

"Neither the President, nor any officer of the Federal Governmen has power to control or to dismiss the prosecution in Winslow's case, in any case where the offense is against the laws of one of the State and could not give any stipulation or make any arrangement whatev as to the offenses for which he should be tried when returned to the ju tice of the State against whose laws he may have offended.

"But, as I have before stated, a treaty, duly ratified and proclaime is in the United States the supreme law of the land, and if the extrad tion treaty did, as it does not, provide that no criminal could be tri for any other than certain particular offenses, such a provision wou be binding upon all courts, both State and Federal.

"The absence of any such provision from the treaty between the Unt States and Great Britain leaves to the State courts the extent of juri diction over returned criminals, which has been so repeatedly referr to as recognized by the judicial decisions of the courts of both countrie

"His lordship refers to the 'late case of Blair, who was' (as his lor ship mildly expresses it) 'inveigled by a British subject, with the assis ance of American officers from the United States, and tried at Live pool for fraudulent bankruptcy, and sentenced to imprisonment.' H was promptly released by the British Government, which sent him bac

to the United States, paying his expenses back to the place whence he had been brought. This prompt and generously just conduct of Her Majesty's Government is duly recognized and appreciated by the United States.

"The abduction was, however, regarded by this Government as a case of kidnapping; but the power so promptly and efficiently exercised by the British Government is an evidence of the inherent power existing in the political department of that Government, when it sees fit to exercise it, over the person of the individual, and in control even of the judgments of the courts. Could not the power thus summarily exercised in an act of comity, and in consideration of a wrong committed in a distant jurisdiction, be also exercised in the performance of a treaty obligation, and in aid of the administration of justice without being hampered by the technicalities of a municipal act? Whether Blair personally desired to be returned to the United States is not known, nor is it supposed to be of any consequence. He was deported and sent out of Her Majesty's jurisdiction by the political authorities of the Government without process of law, but merely upon the representation of the United States of the circumstances attending his abduction or inveiglement.

"His lordship speaks of having been 'assured of the intention of the United States Government to try Lawrence for other than the extradition crime for which he was surrendered.' Her Majesty's Government has never been thus assured, and for the very good reason that the Government of the United States has never reached any such conclusion, and has neither expressed nor formed any such intention. It does, however, hold to the opinion that, if thus inclined, it has the power and the right, after having tried him on the charge on which he was surrendered (although he may have been surrendered on only one of twelve or more charges of which the proofs were furnished), with a *bona fide* intent and effort to convict him on that one charge, to try him for others of the many offenses of which he has been guilty. It does not conceal, but avows its belief in this right. And hereupon Lord Derby advances the startling declaration, which I repeat in his own words: 'They' (Her Majesty's Government) 'have always regarded the claim so to try him as a breach of the treaty of 1842.'

"If Her Majesty's Government seriously advances this as indicating a mode whereby, in their judgment, a treaty may be broken, it is as novel as it may prove to be far reaching. It is simply the proposition that the assertion by one party to a treaty of a claim, or of a construction of the instrument not admitted by the other, and without any act in derogation of the convention or of the rights of the other party, constitutes of itself a breach of the treaty.

"I note this assertion, not with a view to discussion, but in the hope that so dangerous a doctrine may prove to have been unguardedly advanced, and may not be left unexplained or unavowed to justify future

action (from whatever quarter) upon its broad statement, under whi treaties and conventions become worthless.

"While it may not be necessary to repeat the position of the Unit States, it is proper to say that the United States has simply demand the performance by Great Britain of her treaty obligation to deliv fugitives under the treaty of 1842, as the same has been in operati for more than thirty years, and insists that no British statute can atta a condition to the treaty foreign to its terms.

"If any proceedings in the United States, in the case of any crimin have given rise to question or complaint, this Government is prepar to hear and properly dispose of any such complaint.

"But while the treaty shall be in force, the Government of the Unit States would be strangely forgetful of the dignity and rights of the cou try if a foreign state were permitted to exact stipulations or engag ments pursuant to her law, but foreign to the treaty, as a condition obtaining the performance of treaty obligations.

"It will be a cause of great regret that a treaty which has worked long and so beneficially should be terminated on such a ground; b the decision of this question is for the authorities of Great Britain. Th United States has in due form, and after complying with every requir ment of the treaty, demanded the surrender of Winslow and the oth criminals in London, and it is for Her Majesty's Government to deci whether Great Britain will or will not perform her treaty obligations.

"You will read this instruction to Lord Derby, and in case he desir it, you will furnish him with a copy."

Mr. Fish, Sec. of State, to Mr. Hoffman, May 22, 1876. MSS. Inst., Gr. Brit For. Rel., 1876.

"*Memorandum of a conversation between Sir Edward Thornton and M Fish, at the Department of State, Saturday, May* 27, 1876.

"Sir Edward Thornton read a telegram from Lord Derby, stating i substance that Mr. Hoffman, the United States *chargé* in London, ha suggested to him that an additional article to the treaty of 1842 migl be negotiated, and he (Lord Derby) thereupon proposed an artic similar to the 3d article of the *projet* of a treaty which was under co sideration between Sir Edward Thornton and Mr. Fish in June, 187 which proposed to restrict the trial of a surrendered fugitive to that f the specific crime for which he may have been surrendered, and to whic article he said Mr. Fish had proposed an amendment prescribing t time within which the fugitive might be at large after trial or discharg before he could be arrested for trial on another offense, and durin which he should be at liberty to return to the country by which he ha been surrendered. That if this proposal be accepted by the Unite States, he (Lord Derby) would sign the new article in London with M Hoffman, or Sir Edward Thornton would be authorized to sign it he with Mr. Fish.

"Mr. Fish, in reply, expressed regret and surprise that Mr. Hoffma should have made any suggestion on the subject, and assured Sir E ward Thornton that Mr. Hoffman had no authority from his Gover

ment to make or to entertain any such proposition or suggestion, but that he was strictly limited to the conveyance of specific instructions from his Government so far as relates to any question affecting the construction of the extradition treaty between the two Governments, and Mr. Fish requested Sir Edward Thornton to assure Lord Derby to this effect. Mr. Fish added that he endeavored to give Mr. Hoffman instructions on that particular question which should be read to Lord Derby, and not to leave anything for oral representation or oral discussion, in order to avoid the possibility of any misapprehension from telegrams or other cause.

"With regard to the proposition for negotiating an additional article to the treaty of 1842, he remarked that although he might have been willing in the negotiation of 1873 to have inserted the article now proposed, in a treaty, which gave to the United States the improvements which it desired in the treaty of 1842, of a larger list of extradition crimes and other advantages, it could not be expected that the United States would now accept the limitations and restrictions upon what it holds to be its rights under the treaty without obtaining any of the advantages for which such limitations might have been accepted.

"That the United States is extremely anxious to reach a satisfactory settlement of the difficulties which have been interposed in the execution of the treaty, but that the proposed article would impose upon the United States the limitation which it denies to exist under the treaty, and would secure no one advantage which it desired, and no improvement upon the treaty of 1842.

"And, further, that in view of the argument which has been advanced by the British Government, of the controlling force of the act of Parliament over all treaties or arrangements for extradition made by Her Majesty's Government subsequent to its enactment, it might be claimed, and possibly not without some force, that an article in amendment or additional to the treaty of 1842, would bring that treaty under the operation and control of the act, which this Government denies to be the case, and cannot consent to. It would be admitting away one of the grounds on which the United States stands.

"He referred to what he considered defective features in the British act of 1870, which he thought made it unequal in its provisions as to the British and to the foreign Governments, and as wanting in reciprocal powers and rights.

"He further said that he thought it unwise to attempt to patch up the treaty of 1842; that the present would not be a propitious moment for such efforts; and that whenever anything is attempted in the way of altering that treaty, it would require a more general revision, and especially an enlargement of the list of extradition crimes.

"Mr. Fish added that the United States would not object in any negotiation to be hereafter entered upon, that a treaty should provide to the effect that a surrendered criminal shall not be tried for any crime or crimes other than such as are of the class enumerated in the treaty as extradition crimes, nor be tried for any political offense.

"In this connection he referred to the treaty negotiated in 1852 between Great Britain and France (signed by Lord Malmesbury and Count Walewski), which contained a provision to that general effect.

"And upon Sir Edward Thornton observing that the act of 1870 would prevent the British Government from agreeing to such a stipulation, Mr. Fish asked whether Her Majesty's Government could not obtain from Parliament a special enabling or ratifying act for the particular treaty which might be negotiated between the two countries.

"Mr. Fish further said that with such provision in a treaty, and wi the similarity of feeling of the two Governments and of their people the question of political asylum, a full protection would be secur against the trial of a surrendered fugitive for any political offense; a that the violation of such provision by either of these two Governmer was not within the reach of contemplation, but, should it occur, it wou lead to the denunciation of the treaty by the surrendering state, whi would also be at liberty to hold the offending state to its respon bilities for violating a treaty engagement; the treaty would be brok by an act in violation of its terms; whereas if the state on which t demand for surrender is made decide that such demand, being made (it must be) for one of the extradition offenses, is really designed to bri the fugitive to trial for a political offense, and refuses surrender on th ground, it would be an imputation upon the good faith of the reque and upon the integrity of the demanding state, which would justly gi rise to resentful feelings, and would equally lead to a denunciation the treaty by the state whose requisition has been refused, and who honor and integrity has been questioned, and in this case the trea would fail, not for an act done, but for the questioning of the good fai of one of the parties.

"HAMILTON FISH.
"EDWARD THORNTON."

"[Telegram.]

"LONDON, *June* 17, 1876.

"FISH, *Washington:*

"Winslow discharged by Judge Mellor in chambers. Judge Lindl refused to act on Brent's application; referred it to court *in banc* Monday.

"HOFFMAN."

"[Telegram.]

"LONDON, *June* 19, 1876.

"FISH, *Washington:*

"Notified by Lord Derby that on Winslow's discharge attorney-ge eral stated present condition of negotiations. To-day Brent discharge attorney-general confining himself, am informed by detectives, to san statement.

"HOFFMAN."

"*Message from the President in relation to the extradition treaty with Gre Britain.*

"*To the Senate and House of Representatives:*

"By the tenth article of the treaty between the United States and Gre Britain, signed in Washington on the 9th day of August, 1842, it wa agreed that the two Governments should, upon mutual requisitions r spectively made, deliver up to justice all persons who, being charge with certain crimes therein enumerated, committed within the jurisdi tion of either, should seek an asylum or be found within the territori of the other.

"The only condition or limitation contained in the treaty to the reci rocal obligation thus to deliver up the fugitive was that it should l

done only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed.

"In the month of February last a requisition was duly made, in pursuance of the provisions of the treaty, by this Government upon that of Great Britain for the surrender of one Ezra D. Winslow, charged with extensive forgeries and the utterance of forged paper, committed within the jurisdiction of the United States, who had sought an asylum and was found within the territories of Her Britannic Majesty, and was apprehended in London. The evidence of the criminality of the fugitive was duly furnished and heard, and being found sufficient to justify his apprehension and commitment for trial, if the crime had been committed in Great Britain, he was held and committed for extradition.

"Her Majesty's Government, however, did not deliver up the fugitive in accordance with the terms of the treaty, notwithstanding every requirement thereof had been met on the part of the United States, but, instead of surrendering the fugitive, demanded certain assurances or stipulations not mentioned in the treaty, but foreign to its provisions, as a condition of the performance by Great Britain of her obligations under the treaty.

"In a recent communication to the House of Representatives, and in answer to a call from that body for information on this case, I submitted the correspondence which has passed between the two Governments with reference thereto. It will be found in Executive Document No. 173 of the House of Representatives of the present session, and I respectfully refer thereto for more detailed information bearing on the question.

"It appears from the correspondence that the British Government bases its refusal to surrender the fugitive and its demand for stipulations or assurances from this Government on the requirements of a purely domestic enactment of the British Parliament passed in the year 1870.

"This act was brought to the notice of this Government shortly after its enactment, and Her Majesty's Government was advised that the United States understood it as giving continued effect to the existing engagements under the treaty of 1842 for the extradition of criminals; and, with this knowledge on its part and without dissent from the declared views of the United States as to the unchanged nature of the reciprocal rights and obligations of the two powers under the treaty, Great Britain has continued to make requisitions and to grant surrenders in numerous instances without suggestion that it was contemplated to depart from the practice under the treaty which has obtained for more than thirty years, until now, for the first time, in this case of Winslow, it is assumed that under this act of Parliament Her Majesty may require a stipulation or agreement not provided for in the treaty

as a condition to the observance by her Government of its treaty-obligations toward this country.

"This I have felt it my duty emphatically to repel.

"In addition to the case of Winslow, requisition was also made by this Government on that of Great Britain for the surrender of Charles J. Brent, also charged with forgery committed in the United States and found in Great Britain. The evidence of criminality was duly heard and the fugitive committed for extradition.

"A similar stipulation to that demanded in Winslow's case was also asked in Brent's, and was likewise refused.

"It is with extreme regret that I am now called upon to announce to you that Her Majesty's Government has finally released both of these fugitives, Winslow and Brent, and set them at liberty, thus omitting to comply with the provisions and requirements of the treaty under which the extradition of fugitive criminals is made between the two Governments.

"The position thus taken by the British Government, if adhered to, cannot but be regarded as the abrogation and annulment of the article of the treaty on extradition.

"Under these circumstances it will not, in my judgment, comport with the dignity or self-respect of this Government to make demands upon that Government for the surrender of fugitive criminals, nor to entertain any requisition of that character from that Government under the treaty.

"It will be a cause of deep regret if a treaty which has been thus beneficial in its practical operation, which has worked so well and so efficiently, and which, notwithstanding the exciting and at times violent political disturbances of which both countries have been the scene during its existence, has given rise to no complaints on the part of either Government against either its spirit or its provisions, should be abruptly terminated.

"It has tended to the protection of society and to the general interests of both countries. Its violation or annulment would be a retrograde step in international intercourse.

"I have been anxious and have made the effort to enlarge its scope, and to make a new treaty which would be a still more efficient agent for the punishment and prevention of crime. At the same time I have felt it my duty to decline to entertain a proposition made by Great Britain, pending its refusal to execute the existing treaty, to amend it by practically conceding by treaty the identical conditions which that Government demands under its act of Parliament. In addition to the impossibility of the United States entering upon negotiations under the menace of an intended violation or a refusal to execute the terms of an existing treaty, I deemed it unadvisable to treat of only the one amendment proposed by Great Britain while the United States desires an enlargement of the list of crimes for which extradition may be asked, and

other improvements which experience has shown might be embodied in a new treaty.

"It is for the wisdom of Congress to determine whether the article of the treaty relating to extradition is to be any longer regarded as obligatory on the Government of the United States or as forming part of the supreme law of the land. Should the attitude of the British Government remain unchanged, I shall not, without an expression of the wish of Congress that I should do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the treaty of 1842.

"Respectfully submitted.

"U. S. GRANT.

"WASHINGTON, *June* 20, 1876."

"I have the honor to acknowledge the receipt of your note of the 13th instant, informing me, at the request of the governor-general of Canada, that one Charles P. Jones was committed to jail at Hamilton, Ontario, upon the 30th ultimo, as a fugitive from the justice of the United States, but, as no application for his surrender under the extradition article of the treaty of 1842 had reached the Canadian Government, he would be entitled to his discharge at the expiration of two months from his commitment.

"The governor of the State of Ohio some time since addressed me, requesting an application in the usual form for the delivery of Jones under the treaty, bu t it was not deemed proper to prefer such application, for the reason stated in my note of the 17th May in reference to the case of Maraine Smith.

"Since the date of that note the case of Winslow has been disposed of by a refusal to surrender him, and by his discharge from custody. Thereupon, and on the 20th ultimo, the President communicated to Congress the reasons which in his opinion made it impossible to prefer further demands for the surrender of fugitive criminals under the 10th article of the treaty of 1842.

"I have the honor to inclose a copy of this message, which will explain the position which the President has felt constrained to adopt, and the reasons why a request for the surrender of Jones has not been preferred.

"In bringing these reasons to the knowledge of the governor-general of Canada, I will thank you to express to him my appreciation of his courtesy in the matter."

Mr. Fish, Sec. of State, to Sir Edward Thornton, July 18, 1876. MSS. Notes, Gr. Brit.; For. Rel., 1876.

"Subsequent to the date of the instruction to Mr. Hoffman of the 22d May, and prior to the date of his lordship's reply, Her Majesty's Government had discharged from custody the fugitives whose surrender had been demanded of Great Britain by the United States, with all the

requirements of the treaty between the two Governments providing for the extradition of fugitive criminals. This act of Her Majesty's Government called for the decision of the President of the United States, which was announced in his message to Congress of the 20th of June last, of which you have been given a copy, wherein he stated that the position thus taken by the British Government, if adhered to, cannot but be regarded as the abrogation and annulment of the article of the treaty on extradition; that, under the circumstances, it would not, in his judgment, comport with the dignity or self-respect of this Government to make demands upon that Government for the surrender of fugitive criminals, nor to entertain any requisition of that character from that Government under the treaty. The general question has therefore, for the present at least, and while the British Government adheres to the position it has taken, become an abstract one, and this Government has no desire, under such circumstances, to prolong a discussion which does not promise to lead to any good result.

"I deem it proper, however, to correct an error of fact into which his lordship appears to have fallen.

"In my instruction of the 24th of May, alluding to a statement of the home secretary that no question had been raised by him until he was satisfied that Lawrence had been indicted, though not arraigned, for smuggling, I stated that the indictment against Lawrence for smuggling was found some time before any proceedings were taken for his extradition. In reply thereto Lord Derby now states, 'this may be so, but Lawrence was arrested and held to bail on this indictment for smuggling after his extradition.'

"After a careful examination of the question, and upon the authority of a report from the officer particularly charged with the prosecution of Lawrence, which entirely agrees with the information in the possession of the Department of State, it may be stated that since Lawrence arrived in the United States in custody upon the proceedings taken in London for his extradition, he has not been arrested, has not given bail, and has not been arraigned or called upon to plead to the charge of smuggling, nor has he been arrested, arraigned, or called upon to plead to any indictment, or to any charge whatever, not based upon the particular charge of forgery, upon which he was surrendered.

"Bail was fixed by the court upon a single indictment based on the forgery on which he was extradited, which was never offered, and to this indictment, based on this forgery, Lawrence pleaded guilty on the 24th of June.

"This plea being entered, he was admitted to bail, and has since been at large pending sentence.

"Some error has also arisen in reference to the statement that I informed Sir Edward Thornton that although Lawrence had not been arraigned for any crime other than that for which he was given up, he had given bail to appear for other crimes.

"The accomplished minister of Great Britain must have misunderstood what was said on this point, as Lawrence, prior to his plea of guilty on the charge for which he was surrendered, and at the date of the alleged conversation, had never given bail upon any charge whatever.

"Believing it important that no mistake of fact should exist as to these proceedings, you will, with Lord Derby's permission, leave with him a copy of this instruction."

Mr. Fish, Sec. of State, to Mr. Pierrepont, Aug. 5, 1876. MSS. Inst., Gr. Brit.; For. Rel., 1876.

"I have the honor to acknowledge the receipt of your note of the 27th instant, wherein you inform me that you have received instructions from Lord Derby to state that Her Majesty's Government will be prepared, as a temporary measure until a new extradition treaty can be concluded, to put in force all powers vested in it for the surrender of accused persons to the Government of the United States under the treaty of 1842, without asking for any engagement as to such persons not being tried in the United States for other than the offenses for which extradition has been demanded.

"Your note also calls attention to the provision laid down in the eleventh article of the treaty of 1842, that the tenth article shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer.

"I have laid your note before the President, who observes with great satisfaction that Her Majesty's Government has decided to use its powers for the surrender of fugitive criminals without asking any stipulations or engagements in the nature of those which, in recent correspondence with reference to the requisition made by the United States in the case of Winslow and others, had compelled him, with extreme regret and reluctance, to reach the conclusion that under the position then taken by the British Government, if it be adhered to, it would not be possible for the Government of the United States either to make demands on Her Majesty's Government for the surrender of fugitive criminals or to entertain requisitions of that character from Her Majesty's Government under the treaty.

"The President concurs fully with Her Majesty's Government in its appreciation of the very serious inconvenience and the great encouragement to crime arising from the failure of the extradition of criminals between two states whose relations of business and of social intercourse are as close and as intimate as those which happily exist between the United States and Her Majesty's dominions, and he greets the decision of Her Majesty's Government, announced in your note to ask no engagement with regard to the trial of persons surrendered, as the removal of the obstacle which arrested the execution and efficiency of the extradition article of the treaty of 1842.

"He hopes, therefore, that Her Majesty's Government will now ta into consideration the applications heretofore made by the Unit States for the surrender of Winslow and Brent and Gray, with rega to each of whom the evidence of criminality has been duly furnish and heard, and was found sufficient to justify his apprehension a commitment for trial in accordance with the requirements of the treat On an indication of readiness to surrender those persons, he will a thorize an agent to receive them, and will be ready and glad to respo to any requisitions which may be made on the part of Her Majest Government under the tenth article of the treaty of 1842, which will then regard as in full force until such time as either Governme shall avail itself of the right to terminate it provided by the eleven article, or until a more comprehensive arrangement can be reach between the two Governments in regard to the extradition of crim nals, an object to which he will be glad to give the attention of th Government, with his most earnest desire for a mutually satisfacto result."

Mr. Fish, Sec. of State, to Sir E. Thornton, Oct. 30, 1876. MSS. Notes, G Brit.; For. Rel., 1876.

"*Message from the President, transmitting documents relative to the exec tion of the extradition article of the treaty of* 1842 *between the Unit States and Great Britain.*

"*To the Senate:*

"When Congress adjourned in August last the execution of the extr dition article of the treaty of 1842 between the United States and Gre Britain had been interrupted.

"The United States had demanded of Her Majesty's Government th surrender of certain fugitives from justice, charged with crimes con mitted within the jurisdiction of the United States, who had soug asylum and were found within the territories of Her Britannic Majest and had, in due compliance with the requirements of the treaty, fu nished the evidence of the criminality of the fugitives, which had bee found sufficient to justify their apprehension and commitment for tria as required by the treaty, and the fugitives were held and committe for extradition.

"Her Majesty's Government, however, demanded from the Unite States certain assurances or stipulations as a condition for the surrende of these fugitives.

"As the treaty contemplated no such conditions to the performanc of the obligations which each Government had assumed, the deman for stipulations on the part of this Government was repelled.

"Her Majesty's Government thereupon, in June last, released two o he fugitives (Ezra D. Winslow and Charles I. Brent), and subsequentl released a third (one William E. Gray), and refusing to surrender, sc hem at liberty.

"In a message to the two houses of Congress on the 20th day of June last, in view of the condition of facts as above referred to, I said:

"'The position thus taken by the British Government, if adhered to, cannot but be regarded as the abrogation and annulment of the article of the treaty on extradition. Under these circumstances it will not, in my judgment, comport with the dignity or self-respect of this Government to make demands upon that Government for the surrender of fugitive criminals, nor to entertain any requisition of that character from that Government under the treaty.'

"Article XI of the treaty of 1842 provided that—

"'The tenth article (that relating to extradition) should continue in force until one or the other of the parties should signify its wish to terminate it, and no longer.'

"In view, however, of the great importance of an extradition treaty, especially between two states as intimately connected in commercial and social relations as are the United States and Great Britain, and in the hope that Her Majesty's Government might yet reach a different decision from that then attained, I abstained from recommending any action by Congress terminating the extradition article of the treaty. I have, however, declined to take any steps under the treaty toward extradition.

"It is with great satisfaction that I am able now to announce to Congress and to the country that by the voluntary act of Her Majesty's Government the obstacles which had been interposed to the execution of the extradition article of the treaty have been removed.

"On the 27th of October last, Her Majesty's representative at this capital, under instructions from Lord Derby, informed this Government that Her Majesty's Government would be prepared, as a temporary measure, until a new extradition treaty can be concluded, to put in force all powers vested in it for the surrender of accused persons to the Government of the United States, under the treaty of 1842, without asking for any engagement as to such persons not being tried in the United States for other than the offenses for which extradition had been demanded.

"I was happy to greet this announcement as the removal of the obstacles which had arrested the execution of the extradition treaty between the two countries.

"In reply to the note of Her Majesty's representative, after referring to the applications heretofore made by the United States for the surrender of the fugitives referred to in the correspondence which was laid before Congress at its last session, it was stated that on an indication of readiness to surrender these persons, an agent would be authorized to receive them, and I would be ready to respond to requisitions which may be made on the part of Her Majesty's Government under the tenth article of the treaty of 1842, which I would then regard as in full force until such time as either Government shall avail itself of the right to terminate it provided by the eleventh article, or until a more comprehensive arrangement can be reached between the two Governments in

regard to the extradition of criminals—an object to which the attenti of this Government would gladly be given, with an earnest desire fo mutually satisfactory result.

"A copy of the correspondence between Her Majesty's representati at this capital and the Secretary of State on the subject is transmitt herewith.

"It is with great satisfaction that I have now to announce that E Majesty's Government, while expressing its desire not to be understo to recede from the interpretation which, in its previous correspondei it has put upon the treaty, but having regard to the prospect of a n treaty, and the power possessed by either party of spontaneously nouncing the old one, caused the rearrest on the 4th instant of Bre one of the fugitives who had been previously discharged; and, af awaiting the requisite time within which the fugitive is entitled to peal or to apply for his discharge, on the 21st instant, surrendered h to the agent appointed on behalf of this Government to receive and convey him to the United States.

"Her Majesty's Government has expressed an earnest desire to re rest and to deliver up Winslow and Gray, the other fugitives who h been arrested and committed on the requisition of the United Stat but were released because of the refusal of the United States to gi the assurances and stipulations then required by Great Britain. The persons, however, are believed to have escaped from British jurisd tion; a diligent search has failed to discover them.

"As the surrender of Brent, without condition or stipulation of a kind being asked, removes the obstacle which interrupted the executi of the treaty, I shall no longer abstain from making demands upon H Majesty's Government for the surrender of fugitive criminals, nor fr entertaining requisitions of that character from that Government und the treaty of 1842, but will again regard the treaty as operative, hopi to be able before long to conclude with her Majesty's Government a n treaty of a broader and more comprehensive nature.

"U. S. GRANT.

"WASHINGTON, *December* 23, 1876."

"*List of papers transmitted to the Senate with the foregoing message.*

"Sir Edward Thornton to Mr. Fish, May 13, 1876.
"Mr. Fish to Sir Edward Thornton, May 17, 1876.
"Sir Edward Thornton to Mr. Fish, May 23, 1876.
"Sir Edward Thornton to Mr. Fish, May 26, 1876.
"Sir Edward Thornton to Mr. Fish, July 13, 1876.
"Mr. Fish to Sir Edward Thornton, July 18, 1876.
"Sir Edward Thornton to Mr. Fish, October 27,1876.
"Mr. Fish to Sir Edward Thornton, October 30, 1876.
"Mr. Fish to Mr. Pierrepont (telegram), November 1, 1876.
"Mr. Fish to Mr. Pierrepont (telegram), November 24, 1876.
"Sir Edward Thornton to Mr. Fish, November 29, 1876.

"Mr. Pierrepont to Mr. Fish (telegram), November 30, 1876.
"Mr. Pierrepont to Mr. Fish, November 30, 1876.
"Mr. Pierrepont to Mr. Fish (telegram), December 4, 1876.
"Mr. Fish to Mr. Pierrepont, December 5, 1876.
"Mr. Pierrepont to Mr. Fish (telegram), December 23, 1876.
"Mr. Fish to Sir Edward Thornton, December 23, 1876."
For. Rel. 1877.

On December 23, 1876, Mr. Fish, in a note to Sir E. Thornton, stated that, as the British Government had ordered the arrest for the purpose of surrrender of certain fugitives from the United States, "the President will be now ready to respond to any requisitions which may be made on the part of Her Majesty's Government, under the 10th article of the treaty of 1842," etc.

"Upon the receipt of your telegram of the 23d instant, stating that Brent, having been delivered up, had sailed from Liverpool in the steamer Parthia, a note was addressed to Sir Edward Thornton, informing him of the fact of the surrender of the fugitive, and his departure for the United States, as well as that Winslow and Gray, for whom warrants had been issued, could not be found, and stating that the President would now be ready to respond to any requisitions preferred by Her Majesty's Government, and would hereafter make similar requisitions under the treaty, and regard the treaty as in full force, subject to the right reserved to either party to terminate the same pursuant to the eleventh article thereof. I informed you immediately of the substance of the note by telegraph, on its transmission on the 23d.

"A copy of the note in question and of Sir Edward's reply thereto is herewith inclosed.

"At the same time a note was addressed to the British representative with reference to Maraine Smith, who has been held for a long time, as you know, and requesting his surrender. * * *

"Upon the 26th the British minister himself addressed the Department, asking that a warrant might be issued for the arrest and detention of one Alfred Brush, a fugitive from the justice of Canada, with a view to his extradition, and a warrant or mandate from this Department was issued the same day.

"Extradition appears therefore to have been fairly re-established between the two countries under the tenth article of the treaty of 1842.

"The President transmitted to Congress upon the 26th instant a special message with reference to extradition, accompanied by copies of the late correspondence on the subject. As soon as printed copies are obtained of the correspondence and message, copies shall be transmitted.

"The President reviews the question, and announces that he will hereafter entertain and make requisitions for the surrender of fugitive criminals."

Mr. Cadwalader, Acting Sec. of State, to Mr. Pierrepont, Dec. 27, 1876. MSS. Inst., Gr. Brit.; For. Rel., 1876.

In a letter from Mr. Fish, Secretary of State, to Mr. Cameron, chairman of Senate Committee of Foreign Relations, February 7, 1877, it is asserted that "the right to try a surrendered criminal for other than the crimes for which his extradition has been obtained has been very positively asserted by this Government, and, as is believed, is now universally conceded, unless it be limited by the terms of the treaty." But the same letter proceeds to argue in favor of a treaty limitation on the ground that many offenses are punishable in Spain (*e. g.*, those relating to religious worship) which would not be punishable in the United States. (MSS. Report Book No. 12.) And the predicate "universally conceded" can only be understood, in this view, as referring to "right" in the sense of "power." That it is morally right, after obtaining a rendition of a fugitive for a treaty crime, to try him for a non-treaty crime, so far from being generally conceded, is generally contested, and the wrongfulness of such a course is implied in Mr. Fish's suggestions as given above of future treaty limitations.

This controversy is discussed in 2 Calvo droit int. ed. (3d), 399.

"During the correspondence on this subject with Great Britain, the United States maintained that the treaty and the practice between the two countries would allow the prosecution for an offense distinct from that for which he was surrendered. At the same time the Government has admitted that the proceeding must not be a mere pretense to obtain possession of the prisoner, and in the case of Lawrence, who was being proceeded against in the Federal court, the President directed that he should first be placed on trial for the particular offense with which he was charged, with a *bona fide* effort to convict him of this offense before any question of further prosecution was considered."

Mr. Fish, Sec. of State, to Mr. McCreery, Mar. 7, 1877. MSS. Dom. Let.

"Fugitives when surrendered to justice without more being said, are surrendered thereto, generally, absolutely and simply."

Opinion of Mr. Phillips, Solicitor-General, 15 Op., 500, adopted by Mr. Frelinghuysen, Sec. of State, in letter to Mr. Brewster, Nov. 21, 1882. MSS. Dom. Let.

"In 1875, the dispute concerning Lawrence, the forger, arose. Lawrence's extradition had been demanded on a dozen distinct counts of forgery, and he had been surrendered on one count alone. The charge on that count proving defective, the New York court proceeded to take up the other counts for the same offense. Her Majesty's Government demanded that, according to the act of 1870, assurance should be given that Lawrence should not be tried for any other than the extradition crime, proved by the facts on which the surrender was grounded. This assurance could not be given. As a result, the operation of the extradition article was for a time suspended, and justice failed in several cases, to the manifest inconvenience of both countries. The situation so created became at last intolerable, and the dispute was ended by the tacit admission on the part of Her Majesty's Government that the domestic act of one of the parties should not control an international

compact made before its passage. An agreement was entered into that the tenth article of the treaty of 1842 should continue effective between the two Governments, according to its terms, until replaced by a new treaty. The British declaration to this effect appears in a note addressed by Sir Edward Thornton to Mr. Fish, under date of October 27, 1876, since when no dispute has occurred."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, July 15, 1884. MSS. Inst., Gr. Brit.

L., a naturalized citizen of the United States, was arrested in Ireland at the instance of this Government, and extradited, under the treaty with Great Britain of 1842, upon a charge of forgery. The extradition proceedings occurred in 1875, under the British act of 1870. Upon being brought back to this country he was arrested on bench warrants issued by a United States circuit court, based on charges of other offenses committed before his surrender, and was afterwards served with a *capias* issued by the same court in a civil suit brought by the United States to recover a debt due prior to his surrender. Immunity from prosecution in any civil action, or for any offense other than that for which he was extradited, was claimed for him, mainly upon the following grounds: (1) that such immunity is provided for by the British act of 1870; (2) that it is to be implied from the treaty of 1842; (3) that it is conceded by sec. 5275, Rev. Stat. It was advised (1) that the British act of 1870 and sec. 5275, Rev. Stat., did not apply; (2) that the immunity did not arise by implication from the treaty of 1842; (3) that the jurisdiction of the courts was not restricted to the extradition crime.

15 Op., 514, Phillips, 1875.

When discussing this question in the eighth edition of my work on Criminal Practice and Pleading, section 49, and also in the second edition of my book on Conflict of Laws, section 846, I took the position that it was "an abuse of this high process, and an infringement of those rights of asylum which the law of nations rightly sanctions, to permit the charge of an offense for which extradition lies to cover an offense for which extradition does not lie, or which it is not considered politic to invoke." In Rauscher's case, decided, in conformity with this view, by the Supreme Court of the United States on December 6, 1886, it was held that where a party was extradited from England on the charge of murder of a sailor, he could not be tried, when brought to this country, on the charge of inflicting cruel and unusual punishment on the same seaman (Waite, C. J., diss.). But aside from cases arising under treaties, the question is not how the defendant was brought into the jurisdiction, but whether he is in it. If he is, he is indictable in such court, no matter by what outrageous perversion of process he was brought within its clutch. (Caldwell's case, 8 Blatch., 131; U. S. *v.* Lawrence, 13 Blatch., 295; Adriance *v.* Lagrave, 59 N. Y., 110; Miller, *in re*, 6 Cr. Law Mag.; 511; 19 Bost., Rep , 453; Ker's case, 110 Ill. 631, aff. Sup. Ct. U. S., Dec. 1886. See note to 6 Cr. Law Mag., 514, and several Canada rulings cited in U. S. For. Rel. 1876, 235; Clarke on Extrad. (2d ed.), 90–93; Paxton's case, 10 Low. Can. Rep., 212, 11, 352; Von

Aernam's case, Up. Can. Rep., 4 C. P., 288. See also House Ex. Doc. 173, 44th Cong., 1st sess.)

That as a matter of international law the defendant should only be tried for the offense for which he is extradited, see Mr. W. B. Lawrence, 14 Alb. Law J., 96; 19 *ibid.*, 329; Cairns, chancellor, as quoted in U. S. For. Rel., 1876, 286, 296; Spear on Extrad., chap. vi; Lowell, J., in 10 Am. Law J., 617, 620; U. S. *v.* Watts, 8 Sawyer, 370, 14 Fed. Rep., 130; Com. *v.* Hawes, 13 Bush, 697; 14 Cox C. C., 135; State *v.* Vanderpool, 39 Ohio St., 273; Compton *v.* Wilder, 40 Ohio St., 130; Cannon, *in re*, 47 Mich., 487; Blanford *v.* State, 10 Tex., 627; Kelty *v.* State, 13 Tex. Ap., 158. See to same effect Mr. Sprague in London Law Mag. for 1875, 139; Renault Etude sur l'Extradition. It should be added that a clause in a treaty which provides that the defendant shall be only tried for the offense specified in the demand would sometimes defeat justice. Often a minor treaty offense is contained in the major offense for which extradition is demanded, or one treaty offense, not technically specified in the demand, is ancillary to one which is so specified. In such cases it would not be contended that it is right that the defendant, on the offense as charged turning out not to exactly cover the offense as proved, should be sent back to the country from which he came. The more reasonable treaty limitation is that on the specified charge failing, he may be tried for any other enumerated offense which rests on the same facts as those on which rests the charge in the extradition proceedings. Thus in this way, after a surrender for burglary (including larceny), the defendant could be tried for larceny, burglary not being technically sustainable.

For an account of Winslow's case, see 1 Phill. Int. Law (3d ed.), 548. The author concludes that "their (the American) contention as to the express meaning of article 10 of the treaty of 1842, and as to the inability of the act of 1870 to affect it, seems to be unanswerable. The question as to the tacit understanding and practice that prevailed with regard to extradition is an issue rather of fact than of law."

As to whether, when a treaty excludes citizens of country of refuge, a demand for such a citizen can be maintained, see Trimble's case, *supra*, § 268.

IV. *CRIME MUST HAVE BEEN WITHIN JURISDICTION OF DEMANDING STATE.*

(1) On land.

§ 271.

"I have the honor to inform you, in reply, that the President of the United States neither exercises any authority, nor claims any control, in respect to the persons of citizens of this country who are accused of offenses committed, beyond its jurisdiction, against the laws of a foreign Government; that he would, however, willingly throw no obstacle in the way of their prompt trial by the proper judicial tribunals or authorities of the state within whose jurisdiction the offense was alleged to have been perpetrated; and, consequently, that, in the particular case of the sailors belonging to the crew of the American frigate Constitution, charged with the murder of a boatman of Marseilles in France, he is not disposed to interpose any objection to their surrender by the Sardinian Govern-

ment, on whose territory they had sought an asylum, to the French Government, to be taken to France for trial."

Mr. Derrick, Acting Sec. of State, to Mr. Boislecombe, Oct. 23, 1850. MSS. Notes, France.

"The first reservation which Mr. Moustier makes is that in a case occurring under a treaty of extradition like that between France and Portugal, when the alleged fugitive is a citizen or subject of a third power not a party to the treaty, France exercises absolute authority to determine the question of surrender independently of the state of which the fugitive is a citizen or subject, and France insists upon this, although the treaty of extradition secures to each party the privilege of consulting with a state or sovereign to whom the alleged fugitive holds allegiance.

"I find sufficient reason to approve of your reply to Mr. Moustier on that point. No treaty made between two sovereigns can at all affect any existing rights of a third state which is not a party to the treaty. Whenever such a state interpellates for the maintenance of a legal right of its own, it is entitled to be heard and to have its claim determined upon the principles of international law. I know of no reason for anticipating an exigency in which such an interpellation would be improperly made by the United States, and certainly no ground was afforded by Mr. Moustier's proceedings in the case of De Silveira for supposing that such an interpellation, when properly made, would in any case be disregarded by the French Government."

Mr. Seward, Sec. of State, to Mr. Dix, Feb. 8, 1868. MSS. Inst., France.

"If an American citzien commits a crime in a foreign country and escapes thence to another foreign country, between which and that wherein the offense was committed there exists an extradition for offenses such as that charged, his citizenship does not afford ground for the American representative to do more than to see that his reclamation and extradition are properly made and conducted."

Mr. Fish, Sec. of State, to Mr. Beardsley, Mar. 22, 1873. MSS. Inst., Barb. Powers.

"Your dispatch, No. 130, relating to the demand by Belgium for the extradition from Holland of Adolph Schmiderberg, has been received. In addition to the instruction in my No. 99, the perusal of your No. 130 induces me to point out to you the propriety of inquiring, with some particularity, when and where Schmiderberg was naturalized as a citizen of the United States, of ascertaining whether he has a certificate of naturalization, how long he resided in the United States before obtaining it, how long he has resided away from the United States since obtaining it, what his pursuits in Europe have been, and what evidence there is of an intent on his part to return to this country.

"The criminal law of this country asserts jurisdiction over all offenses committed within the territorial limits of the State or Territory enacting

the law, but over no crimes committed beyond it. An American citizen, therefore, committing an offense in Europe cannot be punished for that offense by the infliction of any punishment under American laws, and will escape punishment altogether if he can claim the protection of his Government against a demand for extradition:

"On motives of general policy it would not be thought worth while to authorize any intervention in favor of a criminal in such case, even if he were a native-born citizen. In the case of a naturalized citizen, the representative of the Government should further inquire whether he be a *bona fide* naturalized citizen, and whether he has done any act indicating a purpose to forfeit his acquired citizenship.

"In the present case the Department, referring to its former instructions, confides in your discretion and good judgment."

Mr. Fish, Sec. of State, to Mr. Gorham, Apr. 16, 1874. MSS. Inst., Belgium; For. Rel., 1876. As to extraterritorial crime, see *supra*, § 15.

"You also mention the desire expressed by the Russian minister of foreign affairs, that the treaty contain a provision for the extradition of persons charged with the commission of crimes against the laws of either country outside of the territorial jurisdiction of the country whose laws are offended against. This cannot be conceded. It is at once repugnant to the policy of this Government and to the criminal jurisprudence of the United States, and in effect would render the municipal law of one country operative within the territorial sovereignty of another independent sovereign power. By the Constitution of the United States an accused party is entitled to trial within the State and district wherein the crime is committed; no offender can be tried in the United States for an offense committed without its jurisdiction."

Mr. Fish, Sec. of State, to Mr. Jewell, May 9, 1874. MSS. Inst., Russia.

"In view of the marked difference which is known to exist between the criminal jurisprudence of the United States and that of many of the nations with which we enter into treaty relations on the subject, both in the characterization of crimes and the modes of procedure in the trial of persons accused of crimes, and inasmuch as an observance of this policy (of restricting demand to heinous crimes) has so far been found to be effective of the purpose which you very justly ascribe to extradition treaties, *i. e.*, 'to punish crime and prevent criminals of either country from taking up an asylum within the territories of the other,' while at the same time it tends to secure a due regard for individual rights, the Government is not at present disposed to depart from it in concluding any new treaty on that subject."

Same to same, June 5, 1874; *ibid.*

Certain citizens of the United States resident in Italy were delivered by the Italian Government to Belgium on extradition process. They were convicted and sentenced to imprisonment in Belgium. They were

then demanded, when in prison, by the Governments of Germany and of France. The United States minister at Italy was instructed to ask the Government of Italy to request the Government of Belgium not to make such surrender until, in conformity with treaty, the defendants should be allowed one month to leave Belgium.

Mr. Blaine, Sec. of State, to Mr. Marsh, June 26, 1881. MSS. Inst., Italy.

The Government of the United States, when citizens of the United States are extradited on charge of crime from one European country to another, will inquire whether such extradition proceedings are conducted in conformity with law, and instruct its diplomatic representatives to confer on the subject with the Governments effecting such extraditions.

Mr. Blaine, Sec. of State, to Mr. Putnam, June 6, 1881. MSS. Inst., Belgium.

A requisition from the British minister is not authorized by the twenty-seventh article of the treaty of 1794, unless the persons demanded are charged with murder or forgery committed within the jurisdiction of Great Britain.

1 Op., 83, Lee, 1798.

Before extradition proceedings are commenced, it should appear that the crime alleged was committed within the jurisdiction of the demanding Government.

Ibid.; 8 Op., 215, Cushing, 1856. *Supra,* § 15.

The party demanded is subject to extradition, notwithstanding that he may have come to this country otherwise than as an apparent fugitive on account of the particular crime; the treaties applying not only to persons seeking an asylum here professedly, but to such as may be found in the country.

8 Op., 306, Cushing, 1857.

In the extradition convention of 1852, between the United States and Prussia, it is provided that in certain cases the contracting parties shall, on requisition, deliver up to justice all persons who, being charged with the crimes therein specified, "committed within the jurisdiction of either party, shall seek an asylum or shall be found within the territories of the other." Under this convention an arrest was made in New York of S., alleged to be a native of Prussia, and since his birth and still a subject of the King of Prussia. The demand was from Prussia, and he was charged with having committed at Brussels, in Belgium, "and within the legal jurisdiction of Prussia," crimes specified in said convention. The claim was that inasmuch as such crimes were, at the time they were committed, punishable by the laws of Belgium, S., being, when they were committed, a subject of Prussia, was by the laws of Prussia subject to be punished for said crimes in Prussia; that a prosecution against him therefor had been commenced in Prussia, and a warrant of arrest

had been issued against him by the proper judicial tribunal in Prussia having jurisdiction thereof; and that, immediately after committing the crimes he had fled from the justice of Belgium and Prussia. There was no extradition treaty between the United States and Belgium. It was held that the demand could be sustained under the convention.

Stupp, *in re*, 11 Blatch., 124.

Attention was called by the court to the fact that out of seventeen of those treaties and conventions which were then in force, all but one provide for the delivery of persons charged with crimes committed within the "jurisdiction" of one party, who shall seek an asylum within the "territories" of the other.

Ibid.

The case being referred to the Attorney-General, it was held by him (herein differing from the ruling of the court above stated) that it did not fall within the treaty, and a warrant was refused. It was held by him that the term "jurisdiction" is convertible with "country."

14 Op., 281, Williams, 1873. For subsequent proceeding in this case in New York, see *infra*, § 275; *supra*, § 15.

The prisoner not having been delivered up within two calendar months after his final commitment, a motion, under section 4 of act 12th August, 1848 (9 Stat. L., 302; Rev. Stat., § 5273), was made to Judge Blatchford, on notice to the Secretary of State, to discharge the prisoner from custody, and he was discharged.

From the opinion of the Attorney-General (14 Op., 281) above noticed the following is taken:

"Thomas Allsop, a British subject, was charged as an accessary before the facts to the murder of a Frenchman in Paris, in 1858, and escaped to the United States, and as he was punishable therefor by the laws of Great Britain the question as to whether he could be demanded by Great Britain of the American Government, under the extradition treaty of 1842, was submitted to Sir J. D. Harding, the queen's advocate, the attorney and solicitor-general, Sir Fitzroy Kelly, since chief baron of the exchequer, and Sir Hugh Cairns, since lord chancellor, and they recorded their judgment as follows:

"'We are of the opinion that Allsop is not a person charged with the crime of murder committed within the jurisdiction of the British Crown, within the meaning of the treaty of 1842, and that his extradition cannot properly be demanded of the United States under that treaty.' Forsyth's case, 268."

11 Blatch., 128. See also opinion of Att'y Gen. Cushing, 8 Op., 215.

The question is whether the term "jurisdiction" applies to the place where the crime originated, or where it took effect. That the latter may have concurrent jurisdiction, see Whart. Cr. Law (9th ed.), §§ 288 *ff*. *Supra*, § 15.

In R. *v.* Nillins, 53 London Law Jour., 157 (1858), it was held that extradition would be sustained in a case where the defendant, when in England, sent letters containing false pretenses to Hamburg, where the money was obtained. See also R. *v.* Jacobi, 46 L. T., 595.

(2) ON SHIP-BOARD.

§ 271*a*.

Thomas Nash, *alias* Robbins, being charged with having committed murder on board the Hermione, a British war-vessel, on the high seas, requisition was made by the British minister for his delivery under the twenty-seventh article of the treaty of 1794. The district judge of South Carolina, before whom the prisoner was brought by *habeas corpus*, made an order, as is stated in the report, at the particular request of the President of the United States, that, as there was sufficient evidence of criminality to justify the apprehension and commitment for trial of the prisoner, he be delivered over by the marshal of the court to the British consul under the twenty-seventh article of the treaty.

Bee's Adm. Rep., 267. *Supra*, § 33*a*.

The speech of Mr. Marshall, afterward Chief-Justice, made in the House of Representatives, when the Administration was attacked for its action in this case, is attached as a note to the above report.

See Whart. St. Tr., 292–456.

The position assumed by Mr. Marshall, on the question of the jurisdiction of Great Britain in the Robbins case, was that "according to the practice of the world, then, and the opinions of writers on the law of nations, the murder committed on board of a British frigate navigating the high seas, was a murder committed within the jurisdiction of the British nation."

Whart. St. Tr., 444.

In Mr. H. Adams's Life of Gallatin we have the following:

"A matter of a very different nature absorbed the attention of Congress during the months of February and March. This was the once famous case of Jonathan Robbins, a British sailor claiming to be an American citizen, who, having committed a murder on board the British ship-of-war Hermione, on the high seas, but escaped to Charleston, and, under the 27th article of the British treaty, had been delivered up by the United States Government. At that time extradition was a novelty in our international relations. The President was violently attacked for the surrender, and a long debate ensued in Congress. Mr. Gallatin spoke at considerable length, but his speech is not reported, and although voluminous notes, made by him in preparing it, are among his papers, it is impossible to say what portion of these notes was actually used in the speech. The triumphs of the contest, however, did not fall to him or to his associates, but to John Marshall, who followed him, and who, in a speech that still stands without a parallel in our Congressional debates, replied to him and to them. There is a tradition in Virginia that after Marshall concluded his speech, the Republican members pressed round Gallatin, urging with great earnestness that it should be answered at once, and that Gallatin replied in his foreign accent, 'Gentlemen, answer it yourselves; for my part I think it unans*wer*able,' laying the stress on the antepenultimate syllable. The story is probably true. At all events, Mr. Gallatin made no answer,

and Mr. Marshall's argument settled the dispute by an overwhelming vote."

Adams's Gallatin, 231, 232.
As discussing Robbins' case, see 1 Phill. Int. Law (3d ed.), 544; and see Spear on Extrad., 53; 5 J. Q. Adams Mem., 400.

Murder and piracy committed on board of a British ship-of-war, on the high seas, is "committed within the jurisdiction" of Great Britain so as to justify a demand of surrender by the British Government under the 27th article of the treaty.

Mr. Pickering, Sec. of State, to the President, May 15, 1799 (Robbins' case). See 1 Op., 509, Wirt, 1821. As to Robbins' case, see *supra*, § 33*a*.

In the construction of the British treaty of extradition a crime committed at sea, on board of an American vessel, has been considered the same as if committed in the territory of the United States.

Mr. Buchanan to Mr. Marcy, August 3, 1855, MSS. Dispatches, Gr. Brit.

An extraditable crime on board a United States merchant ship at sea being "committed within the putative territory of the Union, it is justiceable by the federal courts and by them alone;" and if the offender takes refuge in a foreign land, he may be demanded, under treaty, from such land.

8 Op., 84; Cushing, 1856. See *supra*, § 33*a*, for this case in other relations. See Lawrence's Wheaton (od. 1863), 242.

"This Department approves of the conduct of that officer in refusing to give up the men charged with larceny, to whom his dispatch refers. A man-of-war of one country in the port of another, is, during her stay, to be regarded as a part of the country to which she belongs. (*Supra*, § 36.) As such, her commander may exercise his discretion as to whom he may admit on board. This right extends even to a refusal to see a ministerial officer of the law in the foreign port, or to recognize an application to give up a man on board who may have committed an offense on shore. Any person, however, attached to such a man-of-war, charged with an offense on shore, is liable to arrest therefor in the country where the offense may have been committed.

"In the event that a person on board the foreign ship should be charged with a crime for the commission of which he would be liable to be given up, pursuant to an extradition treaty, the commander of the vessel may give him up if such proof of the charge should be produced as the treaty may require. In such case, however, it would always be advisible to consult the nearest minister of the United States. This was done in this instance, and the decision of Mr. Marsh that the persons demanded were not liable to be given up pursuant to the treaty with Italy, is approved by the Department."

Mr. Fish, Sec. of State, to Mr. Case, Jan. 27, 1872. MSS. Dom. Lot. *Supra*, § 33*a*.

R., a person who took passage on board a British vessel at Portland, bound for New Brunswick, attacked and wounded the mate of the vessel when on the high seas, and then escaped to the shore in Maine. The vessel then put into Portland, Me., where the mate died. The British Government demanded the surrender of R. for trial. The offense was made indictable by statute in Maine. His extradition was refused, though it was added that "in case the proceedings now commenced against the accused by the authorities of the State of Maine should not be prosecuted to a trial, or should it appear that without good reason the prisoner should be discharged, and the British Government should see fit to again request the extradition of the accused, such request would receive careful consideration.

Mr. Fish, Sec. of State, to Mr. Watson, Aug. 15, 1874. MSS. Notes, Gr. Brit.

The defendant was subsequently acquitted in Maine on the ground of insanity, and this was held such an acquittal as to bar extradition.

Mr. Cadwalader, Acting Sec. of State, to Mr. Watson, Oct. 17, 1874; *ibid.*

The proper view is that extradition should not be granted where the state in which the defendant has sought an asylum, has, with the prosecuting state, admiralty jurisdiction of the offense, as where the offense was piracy by the law of nations on the high seas. For several reasons this view should be maintained. In the first place, by refusing to surrender, a needless circuity of process involving great cost is arrested. In the second place, a defendant's personal rights would be needlessly imperiled by his forcible removal to a foreign forum. And again, if a surrender could be made in one case of admiralty jurisdiction, it could be made in another; and if the rule be admitted at all, there would be few admiralty prosecutions that might not, at executive discretion, be removed to a foreign land under a foreign law. In such cases the executive of the asylum state may properly refuse to surrender, or a court, on *habeas corpus*, may grant a discharge.

As sustaining this view, see R. *v.* Tivnan, 5 B. & S., 645; S. C. under name of Tirnan, 12 W. R., 848. On the other hand, in Sheazle, *in re*, 1 Wood. & Min., 66, it was held that the extradition treaty with England required the surrender by the United States of a British subject who committed, on a British ship, on the high seas, piracy, which was such by act of Parliament but not by the law of nations. (Compare Bennet, *in re*, 11 Law T. R., 488.) Whart. Conf. of Laws, §§ 839, 842.

It is stated by Sir R. Phillimore, that "the country demanding the criminal must be the country in which the crime is committed." (1 Phill. Int. Law, 413.)

Jurisdiction of crimes at sea is considered in another chapter.

Supra, §§ 33*a ff.*

V. *NO EXTRADITION FOR POLITICAL OFFENSES.*

§ 272.

"Most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *Government* and acts against the *oppressions* of the *Government*.

The latter are virtues, yet have furnished more victims to the executioner than the former. * * * The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries. * * * Treasons, then, taking the *simulated* with the *real*, are sufficiently punished by exile."

Mr. Jefferson, Sec. of State, to Messrs. Carmichael and Short, Mar. 22, 1792. MSS. Inst., Ministers. 1 Am. St. Pap. (For. Rel.), 258.

The Government of the United States cannot consent to the surrender, by the city of Bremen, to another German state, on the plea of dereliction in military service, of a citizen of the United States temporarily residing in Bremen.

Mr. Cass, Sec. of State, to Mr. Schleider, Apr. 9, 1859. MSS. Notes, Hanse Towns.

The rule forbidding extradition for political offenses does not hold, it seems, when the place of asylum is an Oriental or semi-civilized country.

Mr. Seward, Sec. of State, to Mr. McMath, Apr. 28, 1862. MSS. Inst., Barb. Powers.

But this is at variance not only with the approval by both the United States and Great Britain of the refusal of Turkey to surrender Koszta to Austria, but with the general policy of international law.

Supra, §§ 175, 198.

"I have the honor to acknowledge the receipt of your note of the 3d instant, requesting the extradition of the eight Mexican revolutionists who were in the custody of Captain Rafferty, of the Sixth Regiment of United States Cavalry, now stationed in the Territory of Arizona.

"In reply, I have to state that that officer appears to have received the prisoners from the United States marshal there, who probably holds them on a charge of violating the neutrality law of the United States, in making a hostile incursion into Mexico.

"Under these circumstances the answer of the Territorial authorities to the Mexican agent who, it seems, applied for their surrender was necessarily in the negative.

"In any event, it would not be competent for this Department to take any steps with a view to the extradition of the prisoners unless their names shall have been furnished, and the offenses with which they are charged shall have been specified. The fact, too, that they are charged with being revolutionists shows that whatever may have been their other crimes they may also have been guilty of a political offense for which the treaty stipulates that no extradition shall be granted."

Mr. Hunter, Acting Sec. of State, to Mr. Navarro, Sept. 28, 1880. MSS. Inst., Mex.; For. Rel., 1880.

For a resolution requesting that the extradition of Agüero, the Cuban insurgent, to Spain be refused until charges against him are ascertained to be true, and requesting the Attorney-General to investigate the case, and ascertain if his offense is a political one, see House Mis. Doc. 34, 48th Cong., 1st sess., Feb. 8, 1884.

VI. *NO DEFENSE THAT DEFENDANT IS CITIZEN OF ASYLUM STATE.*

§ 273.

That the defendant is a citizen of the asylum state, bars extradition, on principle, in those cases where such state has cognizance of the crime, and it is consequently introduced as an exception in many of our treaties. No such exception is recognized in the treaties with Great Britain, France, Italy, and other states. Under the English common law such an exception cannot be recognized except in cases where the asylum state has jurisdiction over the offense.

Robbins' case, Bee, 266; Whart. St. Tr., 392; Kingsbury's case, 106 Mass., 223; Dana's Wheaton, § 120, note; Lawrence's Wheaton, 237, note.

When the question is one of discretion, the better rule is that wherever, by the jurisprudence of a particular country, it is capable of trying one of its subjects for an offense alleged to have been committed by such subject abroad, the extradition in such case should be refused; the asylum state then having the right of trying its own subject by its own laws. When, however, it does not assume jurisdiction of extraterritorial crimes committed by its subjects, then extradition should be granted.

Where in a treaty (as in the case with the treaties with Austria, Bavaria, Belgium, Hanover, Hayti, Mexico, Netherlands, Peru, Prussia (Germany), Spain, and Sweden and Norway) it is provided that "neither of the contracting parties shall be bound to deliver up one of its own citizens," it is yet to be determined whether this clause leaves to the President the discretion of making such delivery.

Mr. Frelinghuysen's report in Trimble's case, Feb. 13, 1884. *Supra*, § 268.

In 1874, Francisco Perez, a Mexican, murdered an American in Texas, and escaped into Mexico. A request for extradition was made by this Government, coupled with an admission that extradition could not be demanded as a matter of right, the fugitive being a citizen of Mexico, and also with the declaration that the request was not made as a matter of comity, and that the surrender, if made, would not be understood as establishing a precedent to bind either Government. Under these circumstances the Mexican Government refused the request.

In 1879, Zeferino Avalos, a Mexican soldier, murdered a fellow-Mexican in Texas, and escaped into his own country, where he was arrested, tried by a Mexican court, and hung.

VII. *MUST BE SPECIFIC FOREIGN DEMAND.*

§ 274.

As to whether a mandate or certificate from the Department of State is a prerequisite to an arrest, see *infra*, § 276.

As to practice in extradition cases under treaty with Great Britain of 1842, see Mr. Fish, Sec. of State, to Mr. Pierrepont, Jan. 23, 1877. MSS. Inst., Gr. Brit.

As to history of current negotiations, see same to same, Feb. 23, 1877; Feb. 24, 1877; Mar. 2, 1877.

Under the Ashburton treaty a requisition for a fugitive is not necessary to a preliminary examination upon which the evidence of criminality is to be heard and considered, when such examination is with a view only to the surrender after the ascertainment of the facts showing the party charged to be in a condition which justifies the apprehension and commitment for trial according to the laws of the place where he or she shall be found.

4 Op., 201, Nelson, 1843.

The United States will not make demand for extradition of a person alleged to be a fugitive from the justice of one of the United States, and to have taken refuge in Great Britain, except on the exhibition of a judicial "warrant" duly issued, on sufficient proofs, by the local authority of the State in which the crime is alleged.

6 Op., 485, Cushing, 1854.

All demands for extradition must come from the executive authority of the demanding state.

7 Op., 6, Cushing, 1854.

There can be no actual extradition without proper requisition to that effect, addressed by the foreign Government to the Secretary of State; and although extradition cannot be ordered by the President on mere judicial documents, but requires executive requisition, still it may be effected, in the absence of any diplomatic minister of the demanding Government, through other intermediate agencies recognized by the law of nations.

8 Op., 240, Cushing, 1856.

"Applications for extradition are made, as a rule, by the diplomatic representative. In case a consul is charged with such a duty, he may expect to receive instructions from the Department of State, or from the diplomatic representative."

Printed Pers. Inst. Dip. Agents, 1885.

As to mode of arrest, see *infra*, § 276*a*.

VIII. *STATE GOVERNMENTS CANNOT EXTRADITE.*

§ 275.

George Holmes was arrested in the State of Vermont on a warrant or order of the governor of the State, addressed to a State sheriff, stating that an indictment had been found against him for murder in Canada, and commanding the sheriff to convey him to the border between Canada and Vermont, and deliver him to the Canadian authorities. A *habeas corpus* was issued by the Supreme Court of the United States, and the prisoner was remanded, and a writ of error taken to the Supreme Court of the United States. The court was equally divided as to the question of jurisdiction, and the writ of error was dismissed.

Holmes *v.* Jennison, 14 Pet., 540, 1840.

Chief Justice Taney, in his opinion, in which Justices Story, McLean, and Wayne concurred, stated, as their conclusion on this particular point—

"Upon the whole, therefore, my three brothers and myself, after a most careful and deliberate examination, are of opinion that the power to surrender fugitives, who, having committed offenses in a foreign country, have fled to this for shelter, belongs, under the Constitution of the United States, exclusively to the Federal Government, and that the authority exercised in this instance by the governor of Vermont is repugnant to the Constitution of the United States."

Ibid., 579.

Holmes was subsequently discharged by the supreme court of Vermont on *habeas corpus*.

In New York, in 1874, Governor Dix having ordered the surrender of Carl Vogt, *alias* Stupp, after a refusal by the President to surrender him to Germany, as the offense was committed out of her territory, or to Belgium, in the absence of treaty provisions, the court of appeals of New York unanimously agreed in discharging the prisoner, on the ground that the governor had no power to make the surrender.

People *ex rel.* Barlow *v.* Curtis, 50 N. Y., 321. For proceedings in the federal courts in Stupp's case, see *supra*, § 271.

Without the consent of Congress, no State can enter into any agreement or compact, express or implied, to deliver up fugitives from the justice of a foreign state who may be found within its limits.

3 Op., 661, Legaré, 1841.

Where, however, there is no extradition treaty, it was at one time held that the Department may, under peculiar circumstances, sanction the efforts of a State executive to obtain a surrender. In 1837 the Department of State sanctioned a demand from the governor of Michigan on Texas (then an independent State) for the delivery of a fugitive, and in 1840 a demand of the governor of Georgia on Texas for the same pur-

pose, there being no extradition treaty on which the Federal Government could act.

Mr. Forsyth to Mr. Rogers, July 25, 1837. See Mr. Forsyth to Mr. Hardee, Mar. 30, 1840. MSS. Dom. Let.

"An aggravated case of forgery having occurred in the city of New York in the year 1821, and the offender having taken refuge in Canada, Governor Clinton applied to Earl Dalhousie, then governor of Canada, to have him delivered to the authorities of the State of New York for trial, which request was promptly complied with; the case being one in which the interference of the governor of Canada was authorized by the laws of the province—a reciprocation of such friendly and liberal offices, whenever it should become necessary being, in the opinion of Governor Clinton, enjoined by policy as well as required by courtesy; and the state of the question as to the powers of the Federal Executive being at the time the same as it is now, he felt it to be his duty to bring the subject before the legislature of the State. He did so in his annual address, at the succeeding session, in which he stated that 'the treaty with Great Britain having expired fourteen years before, and no conventional provision upon the subject having been subsequently made, a question had arisen whether either the State or national authorities were authorized by the law of the land or obligated by the law of nations, to surrender, in any case, fugitives from justice from foreign countries, and recommended the adoption of adequate general provisions on the subject, which would, he thought, have a salutary tendency in preventing and punishing crimes, and expelling from our territory malefactors who resort to it from other countries in expectation of immunity.'

"The legislature at the same session, viz, on the 5th of April, 1822, passed an act authorizing the governor, in his discretion, to deliver over to justice any person found within the State who shall be charged with having committed, without the jurisdiction of the United States, any crime except treason, which by the laws of this State, if committed therein, is punishable by death or imprisonment in the State prison. This bill received the sanction of the council of revision, then composed of governor, chancellor, and judges of the supreme court of the State, and became a law.

"It continued on the statute-book until 1826, when it came up for revision, and again received the sanction of the legislative and executive departments of the State government, and according to the forms of the constitution was re-enacted, and has been, occasionally, actually enforced as a part of the laws of the State during a period of seventeen years.

"It was in favor of a continuance by Governor Seward to act under this law as his predecessors had done, until it had, at the instance of a

party affected by its operation, been decided by the judicial tribunals to be unconstitutional, that the suggestion of the President was made."

Mr. Forsyth, Sec. of State, to Mr. Spencer, Aug. 7, 1839. MSS. Dom. Let.

"This letter will be handed to you by William Newell, esq., of Philadelphia, one of the directors of the Schuylkill Bank, of that city, who is about to proceed to France in the British Queen steamer, in pursuance to your suggestions to the president of that institution. The President of the United States is desirous that you should extend to Mr. Newell your good offices in the prosecution of the immediate object of his visit to Paris, which is understood to be to obtain from Mr. ———, the absconding cashier, as much of the funds and other property of the bank in his possession, or under his control, as may be practicable. No official interference is justifiable, as in the absence of treaty stipulations, the extradition of a fugitive from France in the United States under similar circumstances could not be authorized by the Executive of the Union.

"The laws of Pennsylvania do not, like those of New York, provide for the surrender of a fugitive from justice who seeks from a foreign nation an asylum within the State."

Mr. Forsyth, Sec. of State, to Mr. Cass, May 29, 1840. MSS. Inst., France.

Since the publication of the ruling of the Supreme Court in Holmes *v.* Jennisen, above cited, the only instance of action of the Department of State recognizing extradition by State process was in 1872, when in the absence of a treaty of extradition with Belgium, the Belgian minister at Washington was informed by Mr. Fish that "in view of the gravity of the crime" in a particular case, the Secretary was willing to point out to him a statute of the Sate of New York passed as early as 1822, and included in the recent revision, which authorizes the governor of that State, at his discretion, to deliver up to the duly authorized minister or agent of any foreign country, any person charged with crime alleged to have been committed in said country;" and it was further stated that "the Department would interpose no obstacle should an application to the governor be successful."

Mr. Fish, Sec. of State, to Mr. Jones, May 1, 1872. MSS. Inst., Belgium. This, however, under the ruling in People *v.* Curtis, above cited, cannot be sustained.

IX. *PRACTICE AS TO ARREST.*

(1) Preliminary executive mandate.

§ 276.

Complaint on oath was presented on June 14, 1852, to a commissioner of the United States by the British consul at New York, charging that Thomas Kaine had committed a murder in Ireland, and stating also that a warrant had been issued for his apprehension in Ireland; that he

was in the United States; and requesting his apprehension for extradition under the treaty of 1842. The commissioner, after an arrest and examination, ordered him to be committed for extradition, to abide the order of the President, and he was held in custody by the marshal. A writ of *habeas corpus* issued from the circuit court, which was dismissed. Application was made to the supreme court for a writ of *habeas corpus*. On this application, four of the judges held that the writ should be refused on the merits. It was held, however, by the chief justice and two of the judges that no proceedings under the treaty could be entertained without a requisition made on the President, and his authority obtained for that purpose; and that a United States commissioner was not an officer within the treaty or acts of Congress to hear and determine the question of criminality; and one justice held that the court had no jurisdiction to grant the writ asked, but did not express an opinion on the merits.

In re Kaine, 14 How., 103.

The prisoner was afterward brought before Mr. Justice Nelson at chambers, and discharged.

Ex parte Kaine, 3 Blatch., 1.

On August 31, 1853, an opinion was given by Mr. Cushing, Attorney-General, to the effect that under the opinions in Kaine's case, 14 How., 103, it might be advisible, under the extradition treaty with Great Britain, for a "mandate" to issue from the executive department "to move to action the proper judicial authorities of the country, in order to the arrest and lawful examination of the party charged with crime, and the investigation thereof for the information of the Government."

6 Op., 91, Cushing, 1853.

After the reception of this opinion, the practice grew up in the Department of State of issuing, when applied for, documents in the nature of certificates that requisitions had been received. These certificates ("mandates" or "warrants" as they were sometimes erroneously called) were only issued when applied for, and they were not applied for in most cases of extradition, arrest being asked for in the first place from commissioner or judge.

The only judicial ruling in which the necessity of such prior executive action was acquiesced in is Farez, *in re* (7 Blatch., 34). Subsequently, however, in Macdonnell, *in re* (11 Blatch., 79), this opinion appears to have been abandoned. See Thomas, *in re* (12 Blatch., 370); Kelley's case (2 Lowell, 339); Ross, *ex parte* (2 Bond, 252); Van Hoven, *ex parte* (4 Dillon, 415).

In Thomas, *in re*, Blatchford, J., delivering the opinion of the court, said:

"Without recapitulating the grounds taken in the various opinions referred to, as reasons for holding that a prior mandate is not made a prerequisite, by any act of Congress, to the issuing, by a magistrate, of a warrant for the arrest of a fugitive whose extradition is sought, and

is not such a prerequisite, except where made so by the treaty, I am prepared to say, that, so far as my own action is concerned, it is not, for the purposes of the present case, or of future like cases (that is, cases where the treaty does not require a previous mandate), to be regarded as the law, that the issuing of an executive mandate, in a case of extradition, is a prerequisite to the entertaining of proceedings, and the issuing of a warrant of arrest, by a magistrate."

On the first hearing in Kelley's case (reported in 9 Am. Law Rev., 167), Judge Lowell held that no such mandate is necessary. Of this decision, Judge Blatchford, in his opinion in Thomas, *in re*, quotes the following sentence (12 Blatch., 378):

"Considering the strong reasons, as well as the great preponderance of authority, against the practice—a preponderance which I find in the treaty itself, in the statute, and in the opinions of the greater number of the judges who have considered the question—and further, that the reasons in its favor have lost their force in the present state of practice in the State Department, I feel constrained to refuse to establish it in this district." In the second hearing in Kelley's case, Judge Lowell merely said: "I issued the warrant upon a sworn complaint made by Her Britannic Majesty's consul at the port of Boston; and gave at length my reasons for not requiring a mandate from the President of the United States to precede the arrest;" and then he reaffirmed the point previously taken.

In his decision in Ross, *ex parte* (2 Bond, 252) Judge Leavitt said: "After a careful investigation of the case, I can perceive no ground for the conclusion that there must be authority from the executive department of our Government, to enable the judge, magistrate, or commissioner to issue a warrant for the arrest of the alleged fugitive."

Judge Dillon, in delivering the opinion of the court in Van Hoven, *ex parte*, said: "It is urged that the prisoner is entitled to be discharged on several grounds:

"1. That, under the treaty (article 6), the President of the United States is required to issue a warrant for the apprehension of the fugitive, that he may be brought before the proper judicial authority for examination. The object of this provision is that the legal proceedings for the surrender of a fugitive may have the sanction of the executive department. (*Ex parte* Kaine, 1 Blatch., 1.) This is given in this case by the mandate of the Secretary of State. (*In re* Farez, 7 Blatch., 34.) Under our system of the separation of the powers of the Government into departments, the warrant of arrest issues from the judicial department, and the substance, spirit, and purpose of the treaty have been complied with in this regard."

On February 18, 1886, Mr. Bayard, Secretary of State, made an order that in all extradition cases brought under the treaty with Great Britain and cognate treaties, no "mandate" or certificate should issue from the Department prior to the action taken by the proper judicial authorities in the premises. (See Mr. Bayard to Mr. West, February 16, 1886, cited *infra*.)

When, however, a preliminary certificate of the President is by treaty or otherwise required, it has been held that a mere notification by the local officer of a foreign Government of the escape of an alleged criminal is not sufficient *prima facie* evidence of a case to call for such preliminary action of the President.

A foreign *mandat d'arrêt*, setting forth the offense of a fugitive from the justice of a foreign country, within the terms of any treaty of extradition, such *mandat* coming through the proper political channel, is sufficient foundation for the issue of the President's mandate authorizing the institution of proceedings before the judicial authorities of the United States.

7 Op., 285, Cushing, 1855.

In such a mandate it is sufficient to charge the offense in the words of the treaty.

Macdonnell, *in re*, 11 Blatch., 79.

The Department of State will not "inaugurate applications for extraditions, on the mere reference to it of papers, without a specific request or expression of the wish of the Department of Justice or of the authority of a State (as the case may be) through which the papers may come to this Department."

Mr. Fish, Sec. of State, to Mr. Pierrepont, Feb. 2, 1876. MSS. Dom. Let.

"This provision of the statutes of the United States (Rev. Stat. U. S., § 5270) is deemed by this Government to be in aid of the provisions of the convention, and the provisions of Article XI of the convention (of Jan. 5, 1877, with Spain) are held to be directory only. Under these circumstances the warrant of authorization from the Secretary of State is not considered as indispensable. It may often happen that an instant arrest is expedient in order to secure the accused fugitive for examination into his criminality, and in such emergencies the delay incident to procuring the warrant of authorization from this Department might defeat the purposes of justice.

"The personal rights, moreover, of the accused are secured by the provisions of the convention no less than by those of the statute, inasmuch as he can only be surrendered on satisfactory evidence of his criminality."

Mr. Frelinghuysen, Sec. of State, to Mr. Barca, May 23, 1882. MSS. Notes, Spain

"After a careful examination of the treaty now in force between the United States and Great Britain in reference to extradition, I have come to the conclusion that it is neither necessary nor proper that any mandate or other authorization should issue from this Department as a preliminary to arrest by the commissioners or other judicial officers in whom the function of arrest and examination in such cases is specifically vested. I am strengthened in this conclusion by the fact that in all cases in which the question had come up before the judicial department of this Government it has been held that, under the treaty in question and the distinctive legislation of the United States, no such preliminary process of this Department is requisite. It is proper, also, to observe that this seems to be the general sense of those who represent Her Majesty's Government in such process, since in most cases the

application for arrest is made directly to the commissioner, or other judicial authority vested with the jurisdiction, the case not coming before this Department until the application for surrender."

Mr. Bayard, Sec. of State, to Mr. West, Feb. 16, 1886. MSS. Notes, Gr. Brit.

Every citizen of the United States being secured by the Constitution against unreasonable arrest, and magistrates being prohibited from issuing warrants except on probable cause, supported by oath or affirmation, the President cannot order the arrest of the master of an American vessel and his confinement for trial upon a communication from the British minister, accompanied by copies of depositions taken before a justice of the peace of the island of Antigua, charging him with the murder of a British subject on the high seas.

2 Op., 267, Berrien, 1829.

The President may initiate extradition proceedings without requiring such proof as would warrant the extradition.

6 Op., 217, Cushing, 1853.

A competent magistrate may take jurisdiction of an extradition case, without the previous issue of the mandate of the United States; but the extradition cannot take place until a proper requisition has been made by the proper "authorities" of the demanding Government to the Secretary of State, and favorably acted upon. The proper "authorities" are such executive agents or officers of the foreign Government as may be entitled to recognition for that purpose at the Department of Foreign Affairs. The requisition need not come through a regular diplomatic minister. The Government applied to may, in its discretion, recognize whom it will as agent *ad hoc* to make the requisition.

8 Op., 240, Cushing, 1856.

(2) Form of complaint and warrant.

§ 276a.

A complaint before a commissioner in an extradition case, verified by the consul of a foreign Government, in which he charges the offense properly, is sufficient, if made by him officially, although he does not make the averments on his personal knowledge of the facts.

François Farez, *in re*, 7 Blatch., 345.

While the alleged fugitive was lawfully held in custody, under a valid warrant of arrest, and the inquiry thereunder was being proceeded with, a second warrant, on a new complaint, for a distinct offense, was issued for his extradition. He was discharged subsequently from the arrest under the first warrant for want of sufficient evidence to justify his commitment, and he was thereafter arrested under the second warrant. It was ruled that the latter arrest was not invalid.

Macdonnell, *in re*, 11 Blatch., 170.

The warrant need only describe the offense in the words of the treaty.

Castro *v.* Uriarte, 16 Fed. Rep., 93.

The mode of procedure under the Treaty of Washington is the preferment of a complaint to a judge or magistrate, setting out the offense charged on oath, whereupon the judge or magistrate may issue a warrant for the apprehension of the person accused. Upon the accused being brought before the judge or magistrate, the latter should hear and consider the evidence of criminality; and if on such hearing the evidence be deemed sufficient to sustain the charge, the same should be certified to the executive authority, that a warrant may issue for the surrender.

4 Op., 201, Nelson, 1843.

A commissioner for the United States, appointed by the circuit court, is a magistrate within the meaning of the law and of the Treaty of Washington, and as such has power to apprehend, examine, and certify as to fugitives from justice.

The alleged fugitive may be arrested a second time on a new complaint, either with or without a new warrant of the President.

6 Op., 91, Cushing, 1853.

A warrant for extradition, issued under section 3, of the act of August 12, 1848, cannot be used to rearrest a person who has been discharged from the custody of the marshal.

12 Op., 75, Stanbery, 1866.

(3) MODE OF ARRESTING AND DETENTION.

§ 276*b*.

A nation claiming a fugitive from justice cannot invade the territorial waters of another state for the purpose of arresting such fugitive.

Mr. Buchanan, Sec. of State, to Mr. Wise, Sept. 27, 1845. MSS. Inst., Brazil.
As to "kidnaping" in Canada, see Mr. Fish, Sec. of State, to Mr. Williams, Aug. 23, 1873. MSS. Dom. Let. As to territorial waters, see *supra*, § 27.

"The treaty of extradition between the United States and Mexico prescribed the forms for carrying it into effect, and does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct from the territory of one party a person charged with crime for trial within the jurisdiction of another."

Mr. Blaine, Sec. of State, to Mr. Roberts, May 3, 1881. MSS. Dom. Let.
See to same effect, Mr. Frelinghuysen to Mr. Roberts, Feb. 5, 1883. *Ibid.*

Article II of the extradition treaty with Mexico of June 20, 1862, is as follows:

"In the case of crimes committed in the frontier States or Territories of the two contracting parties, requisitions may be made through their respective diplomatic agents, or through the chief civil authority of said

States or Territories, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when, from any cause, the civil authority of such State or Territory shall be suspended, through the chief military officer in command of such State or Territory."

Unless the conditions of arrest under this section are strictly complied with, the parties arresting and carrying off the alleged fugitive may be chargeable with kidnapping.

Mr. Bayard, Sec. of State, to Mr. Jackson, Aug. 23, 1886. MSS. Inst., Mex.

When suits are brought against marshals of the United States for lawful acts done by them in the extradition of fugitives from justice, the President may authorize the employment of counsel in their behalf by the United States.

6 Op., 500, Cushing, 1854.

When demand for a fugitive from justice is made under treaty stipulation by any foreign Government, it is the duty of the United States to aid in relieving the case of any technical difficulties which may be interposed to defeat the ends of public justice, the object to be accomplished being alike interesting to both Governments, namely, the punishment of malefactors, who are the common enemies of all society.

7 Op., Cushing, 1855.

It is incumbent upon the United States to provide a place of imprisonment for persons detained for extradition at the instance of foreign Governments.

8 Op., 396, Cushing, 1857.

A discharge by a district judge of a person apprehended as a fugitive from justice does not preclude his rearrest under the warrant of another judge, with a view to a re-examination of the case.

10 Op., 501, Coffey, 1863.

Transit across a third country may be granted as a matter of comity.

"With reference to your dispatch No. 148, of the 11th ultimo, reporting the request made by you of the Spanish Government, at the instance of General Starring, for permission to have Charles W. Angell transported in custody across the territory of Spain, and the compliance of the Spanish Government therewith, I have to instruct you to convey to the Spanish minister for foreign affairs the sincere satisfaction with which this Government has learned of that act of courtesy.

"The question of the right of transit of an extradited criminal in custody across the territory of a foreign state, is now attracting to some extent the notice of this Department. It is presumed that, where the offender is regularly extradited in pursuance of a treaty, and the demanding state has a treaty of extradition with the state across whose

territory transit is sought, it will be sufficient that the crime for which extradition is granted shall also be among those in the treaty with the country of transit, and that the warrant of surrender be exhibited.

"If the procedure in this respect should be different in Spain, I will thank you to advise me."

Mr. Evarts, Sec. of State, to Mr. Lowell, Mar. 5, 1879. MSS. Inst., Spain; For. Rel., 1879.

"The conveyance of an extradited criminal from the country whence he is surrendered to that which which reclaims him, across the territory of an intervening state is a common occurrence, notwithstanding that no offense has been committed and no legal formality of arrest followed in the jurisdiction of the state through which he may pass, and this is done not in pursuance of the stipulations of treaties or the provisions of domestic law, but as a recognition of the just effect of the laws and treaties of foreign states in matters within their competence, which recognition pertains to the sovereignty of an independent state, and is exercised as an act of international comity."

Mr. Evarts, Sec. of State, to Mr. Dichman, Nov. 12, 1878. MSS. Inst., Colombia.

"On the other hand, in the interest of a full understanding of the matter on its merits, this Government is prepared to admit frankly that, in conveying the extradited prisoner across the territory of Colombia without the previous consent of the Government having been asked and given, it prejudiced any right it might have had to seek the exemption of the prisoner from the operation of the local law within the jurisdiction of which he was brought under the stress of circumstances. Had such consent been asked, however, it is conceived that the Republic of Colombia would have felt constrained to grant it, in the same manner as is done in like cases by other states whose constitutional codes are as mindful of individual rights as is that of Colombia, independently of the peculiar conditions under which official transit across the Isthmus rests by reason of the neutrality and freedom guaranteed by treaty."

Ibid.

"It is well known that almost always a civil officer is sent abroad to receive a prisoner whose extradition may be demanded. Usually he adopts sufficient precautions to prevent the escape of the prisoner after he shall have received him into custody. The same course would probably be sufficient for carrying prisoners across the Isthmus of Panama."

Mr. Evarts, Sec. of State, to Mr. Dichman, May 12, 1879. MSS. Inst., Colombia.

X. *EVIDENCE ON WHICH PROCESS WILL BE GRANTED.*

§ 277.

Under the extradition treaty with Great Britain, "the *criminality* of the act charged should be judged of by the laws of the country within whose jurisdiction the act was perpetrated, but the *evidence* on which

the fugitive should be delivered up to justice should be the laws of the place where he shall be found."

Mr. Calhoun, Sec. of State, to Mr. Everett, Aug. 7, 1844. MSS. Inst., Gr. Brit.; same to same, Jan. 28, 1845.

Under the French-American extradition convention the delivery of fugitives shall be made "only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person of the accused shall be found, would justify his or her apprehension and commitment for trial if the crime had been there committed." This language "evidently involves a question of evidence, which, in all cases, so far as the United States are concerned, belongs to the judicial tribunals of the country." "What evidence is necessary in order to authorize an arrest or commitment, depends upon the laws of the state or place where the criminal may be found."

Mr. Calhoun, Sec. of State, to Mr. Pageot, Dec. 4, 1844. MSS. Notes, France. Metzger's case. See Mr. Buchanan, Sec. of State, to Mr. Pageot, Nov. 3, 1847, Nov. 10, 1847. MSS. Notes, France.

"I have the honor to acknowledge the reception of your note of the 5th instant, making inquiries respecting a certain stipulation supposed to have been inserted in several extradition treaties which have been recently concluded by this Government.

"It is believed that you are under a misapprehension in supposing that the provision, as cited in your note, has been inserted in many of the treaties of extradition which this Government has entered into with other powers, or that it has been inserted in any of those recently entered into. I am under the impression that it is to be found in only three of the treaties of extradition concluded by the United States, and in none concluded within the last six years. No question has been raised by either of the Governments with whom treaties have been entered into containing the stipulation, cited in your note, as to its import. I abstain, therefore, from speculating in the abstract upon provisions of detail in treaties of extradition existing between the United States and other countries. It will, as I hope, meet the object of your inquiry on this point to say that, in every treaty of extradition, the United States insists that it can be required to surrender a fugitive criminal only upon such evidence of criminality as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed.

"The second question which you propose is, what may have been the reason why the stipulation which you cite, and which you erroneously think is found in all extradition treaties of this Government concluded since August 21, 1857, was not inserted in the projected treaty signed, but not exchanged, between the Netherlands and the United States in 1857. Governor Marcy and General Cass, who were, pending the negotiations on this question, the Secretaries of State, and under whose

directions they were conducted, have been dead for several years, and it does not appear from the correspondence in this Department that the provision cited by you was at any time under consideration.

"The negotiations appear to have been conducted at The Hague; and unless the records of the ministry there, or possibly the recollection of the distinguished gentlemen who conducted the negotiations on the part of the Netherlands (if Mr. Van Hall be still living) can furnish the answer to the question why the stipulation to which they did agree was introduced instead of one which does not appear to have been proposed, I shall have to regret the inability of this Government to aid in the solution of the question which you raise.

"In reply to your third question, 'Whether there exists in the United States any uniform criminal procedure, that is to say, whether the same laws and rules are in force in relation to criminal procedure in all the States, or whether the laws concerning such procedure are different in the different States,' I have to say that the criminal code of the United States applies only to offenses defined by the General Government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each State establishes and regulates its own criminal procedure, as well with respect to the definitions of crimes as to the mode of procedure against criminals and the manner and extent of punishment."

Mr. Fish, Sec. of State, to Mr. Westenberg, Nov. 12, 1873. MSS. Notes, Belgium; For. Rel., 1873.

"In cases of extradition, it is the practice to furnish the parties authorized to receive the fugitives into custody, with the President's warrant for that purpose, and a duly authenticated copy of the indictment and other necessary papers in each case, but in this instance it has been thought better, in order to facilitate matters, to address the documents which will be required in the case to the care of the legation, where they can be readily obtained by the aforementioned gentlemen on their arrival in London. A sealed envelope is therefore inclosed herewith, containing the President's warrant, and an authenticated copy of the indictment and other necessary papers, together with a number of photographs of Cooper. The envelope you will deliver to the proper persons upon their application to you."

Mr. F. W. Seward, Acting Sec. of State, to Mr. Pierrepont, Oct. 30, 1877. MSS. Inst., Gr. Brit.

A fugitive charged, under the treaty with Great Britain, with the commission of murder in Scotland, apprehended in the United States and examined before a commissioner, and by him certified to be probably guilty on the evidence adduced, should be delivered up to justice if the evidence upon which the application is founded be such as, according to the laws of the place where the fugitive shall be found, would

justify his or her commitment for trial if the crime had there been committed.

4 Op., 201, Nelson, 1843.

The question of holding the prisoner for further examination is one for the magistrate to determine.

6 Op., 91, Cushing, 1853.

The sufficiency of the evidence is a question for the courts, without whose certificate of criminality the President cannot order the extradition.

6 Op., 217, Cushing, 1853.

The United States will not demand from Great Britain the extradition of an alleged fugitive from justice except on a judicial warrant, with proper evidence to justify it, issued by the local authority of the State in which the crime is alleged to have been committed.

6 Op., 485, Cushing, 1854.

The term "public officers" in the treaty of 1843 between the United States and France, or, as it stands in the French copy, "*dépositaires publics*," signifies officers or depositaries of the Government only, and does not comprehend officers of a railroad company, notwithstanding the latter was authorized and subventioned by the French Government.

8 Op., 106, Cushing, 1856.

It is immaterial whether the person charged left the demanding country under apprehension of detection, or for some other reason.

8 Op., 306, Cushing, 1857.

To prove desertion the ship's roll must be exhibited, containing the deserter's name. A consul's certificate will not do.

9 Op., 96, Black, 1857.

It is not necessary that the proceedings be either carried on or approved by the attorney of the United States for the proper district.

9 Op., 246, Black, 1858.

Attorneys of the United States are not required to appear for foreign Governments in extradition cases.

9 Op., 497, Black, 1860.

In order to be admissible at the hearing, the certificate, under the act of 1860 (12 Stat. L., 83; Rev. Stat., § 5271), should show upon its face that the officer who made it is the principal diplomatic or consular officer of the United States resident in the country making the demand of extradition, and should declare that the documents to which it is attached are legally authenticated, according to the laws of the country from which the fugitive escaped.

10 Op., 501, Coffey, 1863. See Farez, *in re*, 7 Blatch., 345.

Evidence of insanity is admissible in extradition proceedings before a United States commissioner, to explain the evidence adduced against the person charged, where it is made the duty of the commissioner to decide upon the sufficiency of the evidence so adduced.

16 Op., 642, Phillips, 1879.

Where depositions from abroad are put in evidence, under the act of 1860, where the charge is forgery, and it appears by them that the forged papers were produced before and deposed to by the witnesses giving the depositions, it is not necessary that the forged papers should be produced here before the commissioner.

Farez, *in re*, 7 Blatch., 345.

After the above rulings, section 5271, Revised Statutes, was modified by act of June 16, 1876. Revised Statutes (ed. 1878), section 5271.

See Fowler, *in re*, 21 Blatch., 300.

The defendant is entitled to produce evidence to show his innocence.

Macdonnell, *in re*, 15 Fed. Rep., 332; 21 Blatch., 300; Catlow, *in re*, 16 Op., 642, Phillips, 1879.

On an investigation before a commissioner, sitting in the State of New York, in an extradition case under said convention, the offender has a right to be examined as a witness in his own behalf.

Farez, *in re*, 7 Blatch., 345; approved in S. C. 7 Blatch., 491.

And this is the case wherever such examination is permitted by the local laws.

Dugan, *in re*, 2 Low., 267.

Under the convention for extradition between the United States and Switzerland, which provides for the delivery of persons charged with certain crimes "when these crimes are subject to infamous punishment," it is sufficient if the crime be subject to infamous punishment in the country where it was committed without its being also subject to infamous punishment in the country from which the extradition is demanded.

Farez, *in re*, 7 Blatch., 345.

Under section 2 of the act of 1848 (9 Stat. L., 302, Rev. Stat., § 5271) as supplemented by the act of 1860 (12 Stat. L., 84), copies of depositions taken in London, before the lord mayor of London, and certified under his hand to be copies of the depositions on which he issued a warrant of arrest against the person charged, and further certified by the minister of the United States in Great Britain to be so authenticated as to entitle them to be received for similar purposes by the tribunals of Great Britain, are competent evidence in an inquiry, under a warrant of arrest, in an extradition case.

Macdonnell, *in re*, 11 Blatch., 170.

Depositions are to be allowed the same weight as if the deponent were present at the hearing.

Farez' case, 7 Blatch., 491; 2 Abb. U. S., 346. See Wadge *in re*, 16 Fed. Rep., 332; 21 Blatch., 300.

Verified translations of foreign documents should be produced.

Henrich *in re*, 5 Blatch., 414; Piet, *in re*, 48 L. T. (N. S.), 120.

As to the degree of evidence required, the law is well stated by Judge Blatchford (7 Blatch., 481), as follows: "It was urged at the hearing, on the strength of an observation made by Mr. Justice Nelson, in the case of *ex parte* Kaine (3 Blatch., 1), that the evidence must be so full, as in his judgment, if he were sitting on the final trial of the case, to warrant a conviction of the prisoner. While I always hesitate to differ with Mr. Justice Nelson in opinion, I am not prepared to adopt this view. It seems to me to be in conflict with the decision in the case of Burr. In that case Chief Justice Marshall sat as a committing magistrate on the question as to whether Burr should be committed for trial for the crime of setting on foot an expedition against the territories of a nation at peace with the United States. The Chief Justice said (1 Burr's Tr., 11): 'On an application of this kind, I certainly should not require the proof which would be necessary to convict the person to be committed, on a trial in chief, nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime alleged had been committed by the person charged with having committed it.' The Chief Justice acted upon that view, and committed Colonel Burr for trial. The convention, in the present case, says that the commission of the crime must be so established as to justify the commitment of the accused for trial if the crime had been committed here. The question before Chief Justice Marshall, in the case of Burr, was merely the question as to the extent to which the fact of the commission of the crime must be established. To say that the evidence must be such as to require the conviction of the prisoner if he were on trial before a petit jury would, if applied to cases of extradition, work great injustice."

XI. *PRACTICE AS TO REVIEW.*

§ 278.

The circuit courts ordinarily do not review the judgments of commissioners on matters of fact. See Kaine's case, 3 Blatch., 1; Van Aernam's case, 3 Blatch., 160; Henrich, *in re*, 5 Blatch., 414, where the practice seems unsettled. But in Stupp's case (12 Blatch., 501) Judge Blatchford held that there could be no reviewal on the *effect* of the evidence when legally admitted. This is affirmed in Vandervelpen's case. (14 Blatch., 137.) In Wiegand's case (14 Blatch., 370) Blatchford, J., said: "In a case of extradition before a commissioner, when he has before him documentary evidence from abroad, properly authenticated under the act of Congress, and such is made evidence by such act, it is the judicial duty of the commissioner to judge of the effect of such evidence, and neither the duty nor the power to review his action thereon is im-

posed on any judicial officer. This province of the commissioner extended to a determination as to whether the embezzlement was a continuing embezzlement."

In questions of law there will be no reversal for formal errors, but only for substantial error in law, or for such manifest error in procedure as would warrant a court of appeals in reversing. (Henrich *in re*, 5 Blatch. C. C., 414.) And, as was subsequently ruled, it is not enough to charge a conclusion at law, *e. g.*, "forgery." The time and place and nature of the crime and its subject-matter should be set out. (Farez' case, 7 Blatch. U. S., 35.) Nor will the court discharge absolutely on account of an error of the commissioner in admission or rejection of evidence. (Macdonnell, *in re*, 11 Blatch., 79.) The practice is, in such case, simply to discharge from the first commitment, leaving the examination to proceed anew. (Farez' case, *ut supra.*)

The Supreme Court has not jurisdiction to review the action of a district judge of the United States in committing a person for extradition under the French treaty of November 9, 1843.

In re Metzger, 5 How., 176.

The issue of a warrant under article 9 of the consular convention with France of 1788 (annulled by act of 1798, 1 Stat., 578), is within the discretion of the district judge, and such discretion cannot be interfered with by the Supreme Court.

1 Op., 55, Bradford, 1795.

It is the right of the United States marshal to refuse to have the body before the State court, and it is the duty of the courts and other authorities of the United States to protect the marshal in such refusal by all means known to the laws. Where a commissioner of the United States has made return according to law that an alleged fugitive from justice is subject to extradition, the President should order the extradition, notwithstanding any conflicting proceedings pending in a State court.

6 Op., 270, Cushing, 1854.

"The insufficiency of an indictment under the 10th article of the Treaty of Washington as proof of criminality against a party claimed as a fugitive from justice in Great Britain, has heretofore been maintained by the Imperial Government under the act of Parliament for carrying the treaty into effect. The Department understands from a note of Lord Napier, of the 20th instant, referring to the case of Wood, that the Canadian authorities take the same position under the act of the parliament of that province entitled 12 Vict., chap. xix.

"Mr. Everett, when United States minister in England, was instructed to maintain the sufficiency of an indictment, and he accordingly addressed a note to Lord Aberdeen to this effect, requesting that the act of Parliament might be altered accordingly. That change, however,

has never been made, nor can it be ascertained that the subject has since been pursued. The escape of Wood is to be regretted."

Mr. Appleton, Acting Sec. of State, to Mr. Howard, June 22, 1857. MSS. Dom. Let.

XII. *PRACTICE AS TO HABEAS CORPUS.*

§ 279.

Prisoners detained as fugitives are entitled to have the case against them tested by *habeas corpus* in a Federal court (see Whart. Cr. Pl. and Pr., § 993); though release will not be granted merely because the prisoner was brought within the jurisdiction by kidnapping.

Ker, *in re*, 18 Fed. Rep., 167. Whart. Cr. Pl. & Pr., § 27.

The right to review has been constantly asserted by State courts.

People *v.* Curtis, 50 N. Y., 321; People *v.* Fisk, 45 How. Pr., 296; Lagrave, *in re*, 45 How. Pr., 301; Com. *v.* Deacon, 10 Serg. & R. 125: Com. *v.* Hawes, 13 Bush., 637; Butler, *ex parte*, 18 Alb. L. J., 369.

But such process cannot test the question of the fraudulency or illegality of the process by which the prisoner was brought within the jurisdiction.

Adriance *v.* Lagrave, 59 N. Y., 110.

In Robb *v.* Connolly (111 U. S., 624), the question was whether a State court in California had jurisdiction to issue a writ of *habeas corpus* to examine the question of the detention of an alleged fugitive from the State of Oregon by an agent of the State of Oregon. In the course of his opinion, Harlan, J., said:

"Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution (and they are bound by it), and the laws of the United States, made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any State to the contrary notwithstanding.' If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court in the State in which the question could be decided to this court for final and conclusive determination.

"The recognition, therefore, of the authority of a State court, or of one of its judges, upon writ of *habeas corpus*, to pass upon the legality of the imprisonment, within the territory of that State, of a person held in custody, otherwise than under the judgment or orders of the judicial tribunals of the United States, or by the order of a commissioner of a circuit court, or by officers of the United States acting under their laws,

cannot be denied merely because the proceedings involve the determination of rights, privileges, or immunities derived from the nation, or require a construction of the Constitution and laws of the United States. Congress has not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction of issuing writs of *habeas corpus* in proceedings for the arrest of fugitives from justice and their delivery to the authorities of the State in which they stand charged with crime."

The practice of issuing such writs by State courts is inconvenient if not unconstitutional.

Mr. Buchanan, Sec. of State, to Mr. Butler, district attorney in New York, Mar. 23, 1847; MSS. Dom. Let.; and to Mr. Durant, district attorney in New Orleans, May 20, 1847; *ibid.*

Mr. Cushing, when Attorney-General, in 1853 (6 Op., 237), denied the right of a State court to take up the case by *habeas corpus* when under examination by a commissioner of the United States.

The following statement of the practice is by Judge Woodruff, in Macdonnell, *in re* (11 Blatch., 79):

"It was held, and held successively for many years (*in re* Veremaitre, 9 N. Y. Leg. Obs., 129; *in re* Kaine, 10 *ibid.*, 257; *in re* Heilbronn, 12 *ibid.*, 65; *ex parte* Van Aernam, 3 Blatch. C. C., 160), that if it appeared to the judge or to the court issuing the writs that the commissioner had acquired jurisdiction, by a conformity of the proceeding to the requirements of the treaty and the acts of Congress, and that he had not exceeded his jurisdiction, that was an end to inquiry; that whether the evidence received by him was sufficient or insufficient was a question to be determined by him; that no tribunal had been provided by the treaty, and no jurisdiction had been given by any act of Congress to any judge, magistrate, or court, to review that decision; that the only review possible was a review by the Executive, to whom the proceedings had before the commissioner were to be returned; that the Executive had power to examine for himself, and determine whether a case had been made within the treaty, and whether a case had been made which called upon him, as the Executive of the Government of the United States, to surrender the fugitive; and that as this special jurisdiction in a special proceeding not theretofore within the jurisdiction, original or appellate, of any court or magistrate of the United States, had been conferred by law upon the magistrate acting under the act of Congress, and as it was made his duty to certify his conclusions as the basis of executive action, without giving any right of appeal, in any form, to any other magistrate or to any court, there was no appeal and no supervisory authority to be exercised, except by the Executive.

"The next stage in the history contained an opinion which is supposed to go one step further. We may say, without disrespect to the decision itself, in any wise, that the decision in which the opinion was pronounced (*in re* Kaine, 3 Blatch. C. C., 1, 4), had other grounds upon which it was deemed to be called for. The decision was, that the commissioner never acquired jurisdiction; but the opinion, nevertheless, went further, and held that, in the case under consideration, there was no competent evidence before the commissioner, that is to say, there was no legal evidence upon which the commissioner could act, for, if the evidence was not competent, it was not legal; that, if there was no competent evidence before the commissioner, the proceedings before the commissioner were to be treated, whenever presented to any other tribunal, as an arbitrary act of commitment, upon mere complaint; and that the question became, therefore, a question of law, not a question of fact, before the court, on *habeas*

corpus, whether a commissioner could, upon complaint, issue a warrant of arrest, and, upon the appearance of the prisoner before him, commit him for surrender. With that view of the subject, and with the assertion of the right to inquire, upon *habeas corpus*, whether the proceedings of the commissioner had been, in that sense, legal, or, in other words, whether he had not departed from his jurisdiction, which was a jurisdiction to inquire into and ascertain facts, and not to declare facts without any evidence before him, we are not disposed, at present, to raise any controversy.

"The next step in the consideration of this subject elicited the opinion (*in re* Henrich, 5 Blatch. C. C., 414) that the court, acting in the proceedings instituted by *habeas corpus* and *certiorari*, was not confined to the mere inquiry whether there was any evidence; but that, if it could see that there was a substantial defect of evidence, it might and ought, not necessarily to discharge the prisoner, but to hold that the warrant of commitment was illegally granted.

"That view of the subject was followed, in its next step, or perhaps in its consequence, by the holding (*in re* Farez, 7 Blatch. C. C., 345, 491), that it was not the duty of the court to discharge when an error, in rejecting evidence for the prisoner had been committed, but to remand, that the error might be corrected, and the proofs be continued, if it was so desired, to the end that the facts might be ascertained, and that, if the prosecuting Government were able, it might yet establish a case against the prisoner. Indeed, in the previous case to which we have referred, to wit, where the judge was of opinion that there was no legal evidence (*in re* Kaine, 3 Blatch. C. C., 1–4), he offered, upon announcing the conclusion he had reached, to detain the prisoner, to the end that the inquiry might proceed, the defects be supplied, and proper and competent evidence be produced before him."

XIII. *PRACTICE AS TO SURRENDER.*

§ 280.

The President will not issue his warrant for the surrender of fugitives, under the tenth article of the treaty of 1842 with Great Britain, where the record does not exhibit the fact that an offense within the terms of the treaty has been committed, nor that there is such evidence of criminality as, according to the laws of the place where the alleged fugitives have been found, would justify their apprehension and commitment for trial if the crime had been there committed, nor that any complaint has been made to any magistrate of the United States by whom such evidence had been heard.

4 Op., 240, Nelson, 1843.

The mode provided for the surrender of persons accused of the crimes mentioned in article 1 of the treaty with France is by requisitions made in the name of the respective parties through the medium of their respective diplomatic agents.

The surrender will be made only when the fact of the commission of the crime shall be so established that, according to the laws of the country in which the fugitive, or the person so accused, shall be found, his or her apprehension and commitment for trial would be justified if the crime had been there committed. The rule of evidence is prescribed in the treaty.

4 Op., 330, Nelson, 1844.

It is the duty of the United States to provide for the imprisonment of persons whose extradition is asked for by a foreign Government.

8 Op., 396, Cushing, 1857.

Under the treaty with Spain, and the act of Congress which was made to carry out that and other treaties of the same kind, the apprehension and delivery of deserting Spanish seamen is a judicial duty; and the State Department cannot change what a judge has done.

9 Op., 96, Black, 1857.

The extradition laws do not require the proceedings against a foreign criminal or a deserting seaman to be carried on, or approved by, the attorney of the United States for the proper district.

9 Op., 246, Black, 1858.

The act of Congress does not require or authorize the issuing of any warrant by the State Department in an extradition case, until the facts are judicially ascertained and certified.

9 Op., 379, Black, 1859.

"The ground upon which the occasional refusal on the part of this Government to deliver up its own citizens rests, is not, as you infer, the absence of reciprocity, but its indisposition to subject citizens of the United States to modes of trial and punishment unknown to our laws and held in abhorrence alike by the Government and people of the United States."

Mr. Fish, Sec. of State, to Mr. Jewell, May 9, 1874. MSS. Inst., Russia.

It is within the discretion of the President to refuse to surrender even after the accused has been remanded on *habeas corpus*. "Referring to your note of the 14th instant, and the inclosed argument of Mr. Irving, representing the British Columbia Government, relative to the extradition of Edward Kelly, I have the honor to inform you that after a careful consideration of the proceedings certified by the commissioner in the last examination of the prisoner, as well as of the argument of Mr. Irving, the President is of opinion that the evidence produced is not sufficient to justify the issuance of a warrant of surrender, the doubts previously entertained by him not having been removed."

Mr. Bayard, Sec. of State, to Mr. West, Apr. 15, 1886. MSS. Notes, Gr. Brit. But see 6 Op., 71, Cushing, 1853.

XIV. *EXPENSES.*

§ 281.

"Unless the crime is one in violation of a law of the United States, such as piracy, murder on board of vessels of the United States or in arsenals and dock-yards, etc., the expense will have to borne by the

party making the requisition. A person who can identify the fugitive must be deputed to do so, and must furnish such a deposition or depositions as will clearly establish the circumstances of the crime. This person must also be authorized to receive the fugitive if his extradition should be granted."

Mr. Fish, Sec. of State, to Mr. Hammond, Feb. 19, 1870. MSS. Dom. Let.

"When the fugitive is charged with an offense against the laws of the United States and his surrender is sought for the purpose of trial and punishment under those laws, the expenses attending his extradition are borne by the United States. It is otherwise, however, where the fugitive is charged, as in the case of Fraser, with an offense against the laws of a particular State, and the extradition is demanded by this Government at the request of the State authorities. In the latter case the expenses are borne by the State at whose instance the surrender of the fugitive is asked."

Mr. Fish, Sec. of State, to Mr. Harvey, June 18, 1874. MSS. Dom. Let. See Mr. Fish to Mr. Williams, Feb. 4, 1875. *Ibid.*

"The offense, with the commission of which the fugitive in this case stood charged, was one against the laws of Washington Territory. In cases of that character, where this Department is requested by the executive authority of a State or Territory to demand the extradition of a fugitive from justice, charged with an offense against the local laws of such State or Territory, the practice is to require that the expenses attending the arrest, examination, and safe-keeping of such fugitive shall be borne by the State or Territory applying for the extradition. A small appropriation is made by Congress to defray the expenses of bringing home criminals from foreign countries."

Mr. Cadwalader, Acting Sec. of State, to Mr. Ferry, Aug. 21, 1875. MSS. Dom. Let.

"There is no law authorizing the payment of such expenses by the United States. When the offense is against the laws of a State, the expenses are to be borne by the State at whose request the surrender of the fugitive criminal is demanded by the Federal Government. The only exception to this rule is where the offense charged is against the laws of the United States, and the prosecution is instituted by the authorities of the United States."

Mr. Evarts, Sec. of State, to Mr. Gordon, Feb. 16, 1878. MSS. Dom. Let.

"I have to acknowledge the receipt of Mr. Welsh's No. 327, of the 29th of July last, inclosing a copy of a note dated the 23d of the same month, from the Marquis of Salisbury, in which it is proposed that this Government shall enter into an arrangement with that of Great Britain by which an account shall be rendered and payment made of expenses

incurred in connection with cases of extradition once annually, at the most convenient period of the financial year.

"In reply, I have to say that the treaty of 1842, Article X, provides that 'the expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.'

"The statutory provisions in regard to extradition are silent on the question of expenses.

"No legal objections are perceived to entering into such an arrangement as that proposed by the Marquis of Salisbury.

"An inconvenience, however, might arise from such an arrangement as the result of the following circumstances:

"There are very few requisitions for offenses against the Federal laws. Each State and Territory is required to bear the expenses of requisition and extradition in each case presented by it for the extradition of fugitive criminals from the justice of such State or Territory.

"The expenses which this Government would be called upon by Great Britain to pay are such as are usually incurred about Scotland Yard, such as services of detectives, the expenses of keeping prisoners, etc.

"These expenses the agent appointed by the President, on the nomination of the executive of the State, is expected to pay at the time of taking charge of the fugitive. If, in any case, they should be left unpaid, as in some few cases they have been, this Department might be called upon to audit and pay a considerable sum at the end of the year without any fund under its control from which it could properly pay, and might, moreover, find it difficult to get reimbursement from the State. As the matter is now, each case can be scrutinized on its own merits and at the moment.

"In view of these circumstances this Department does not consider it expedient to enter into the arrangement proposed in the Marquis of Salisbury's note above mentioned. I will thank you to communicate this conclusion to Her Majesty's Government."

Mr. Hunter, Acting Sec. of State, to Mr. Hoppin, Sept. 15, 1879. MSS. Inst., Gr. Brit.; For. Rel., 1879.

"I have to acknowledge the receipt of your dispatch No. 128, of the 27th of December last, referring to Mr. Welsh's No. 327, of the 29th of July last, and to the instruction No. 371, of the 15th of September last, of this Department upon the subject of the method of settling accounts of extradition expenses. You also inclose a copy of your correspondence with the British foreign office upon the subject in question since the date last mentioned, from which it appears that in consequence of the divergence of opinion as to the most convenient method of effecting the payment of extradition expenses expressed by the various Governments, to which the Marquis of Salisbury had addressed communi-

cations on the subject, his lordship had reached the conclusion that it would be best to adhere to the plan hitherto pursued, preferring separately each claim arising on a case of extradition, and he therefore asks this Government to accede to the proposed arrangement.

"In reply, I have to instruct you to inform Her Majesty's Government that this Department approves of the plan proposed, with the understanding, however, that the arrangement shall not preclude the settlement of expenses on the spot by the agent sent to receive the prisoner, or make it obligatory that the claim should be formally preferred by one Government to the other, and so settled. The few cases where the expenses are not paid on the spot would, of course, it is thought by this Department, be properly matters for adjustment between the two Governments."

Mr. Evarts, Sec. of State, to Mr. Hoppin, Mar. 25, 1880. MSS. Inst., Gr. Brit.; For. Rel., 1880.

"All accounts in extradition cases where the fees are to be paid by the Secretary of State, under the provisions of the act of Congress of the 3d of August, 1882, should be made out and forwarded in accordance with the provisions of that act. The fee bills of the several officers of the United States in this case, including your own, appear to be substantially in such accord, and no objection is now made to these. The translator's bill, however, is no proper part of the extradition expenses; and the Department does not feel authorized under the act in question to pay it. It is the business of the proceeding or demanding Government to adduce the evidence and bring forth the testimony upon which it expects to establish the criminality of the accused, and this must be put forward in such form and language as will be intelligible to and convenient for the court. In other words, it must be ready for immediate use—instantly available. The bill in this case, moreover, appears to be extremely large."

Mr. Frelinghuysen, Sec. of State, to Mr. Patterson, Apr. 2, 1884. MSS. Dom. Let.

By treaty between the United States and Great Britain, the expense attending proceedings in extradition is to be borne by the Government making the demand. But where the Government of the United States is compelled to intervene, in a conflict between State and United States authorities, to maintain its supremacy and secure the extradition, the special expense should be paid, in the first instance at least, by the United States.

7 Op., 396, Cushing, 1855.

The ordinary expenses of extradition, including fees of counsel, should be paid by the demanding Government.

Ibid., 612.

By the extradition treaty between the United States and Prussia, the expenses of extradition are borne by the Government demanding it, and a commissioner or marshal may lawfully charge such fees as are usual for analogous cases rendered to the United States.

9 Op., 497, Black, 1860.

XV. *TREATIES RETROSPECTIVE.*

§ 282.

Extradition treaties, it has been held, cover cases of crimes committed before their adoption.

Giacomo, alias Ciccariello, *in re*, 12 Blatch., 391. See, however, *contra*, article by Bar, an eminent German jurist, in the Revue de droit int. for 1877.