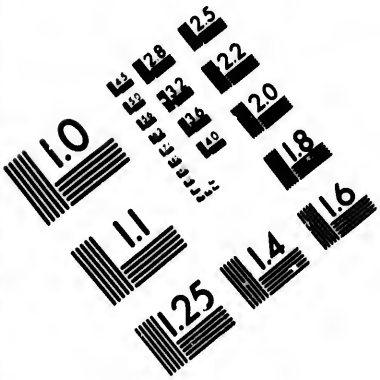

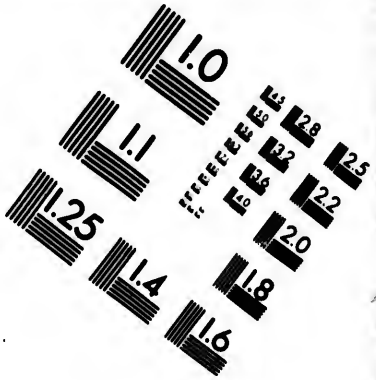

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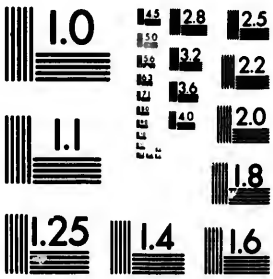

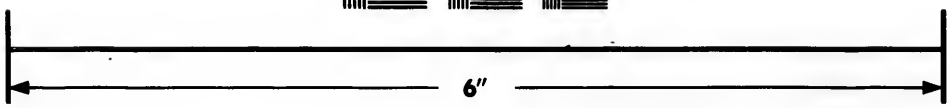

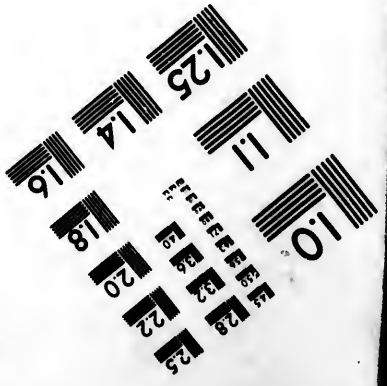

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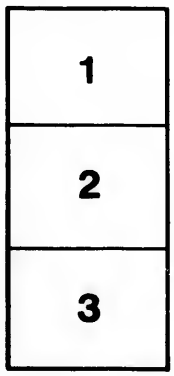

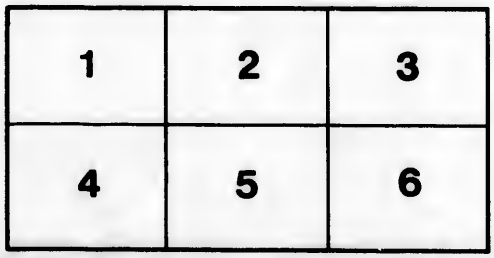

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THE

FOREIGN ENLISTMENT ACTS

OF

ENGLAND & AMERICA.

THE "ALEXANDRA" & THE RAMS.

BY VIGILANS.

LONDON:
SAUNDERS, OTLEY, AND CO.
66 BROOK STREET, W.
1864.

THE law has prohibited certain things, but it has not made them wrong in themselves, nor are we able to see why the selling of ships to belligerents by the subjects of neutral States should be prohibited by the municipal law. It seems unwise to enact further restraints on our natural liberty than the law of nations has imposed, and thus to give foreign States and their adherents a claim to interfere in the management of our domestic affairs.

We do not wish to see a return to *ex officio* prosecutions for violations of a statute which it is open to any one who pleases to enforce, and while we abhor the slavish timidity which would call upon Government to abridge liberty at home in order to conciliate animosity abroad, we are firmly convinced that as no law has been strong enough to put down smuggling when a large profit is left on the transaction, so the Northern States must provide themselves with some better defence than our Foreign Enlistment Act and their own inefficient navy if they wish to arrest the depredations and confound the enterprise of the Confederate States.—THE TIMES, *April*, 1863.

PREFACE.

THE many important questions involved in the seizure of the *Alexandra* and the Rams have been closely scanned and scrutinized by all those who in any way take an interest in the legal or political passing events of the day. The case of the *Alexandra* has "dragged its slow length along" through the first stage of trial, and in the speeches of prosecution and defence no conceivable point of attack and no possible loophole have been overlooked in the desire to secure victory to their respective clients. The discussions in Court and the writings on the question "out of doors" have placed the public in complete possession of every detail of the case, and thus a layman, choosing to sift for himself from the mass of argument the essence of the attack and defence, can form, without much difficulty, a tolerably succinct view of the real questions at issue. The case of the Rams not having as yet been *sub judice*, may be said, as far as any legal argument goes, to be hardly ripe for discussion. Both cases, however, being alike prosecutions under the Foreign Enlistment Act, the decision in the one will doubt-

less have considerable effect upon any proceedings to be eventually taken in the other. Should the *Alexandra* be finally condemned, it must be admitted that there cannot be much hope of a successful defence of the Rams; whilst if the defence of the *Alexandra* is successfully maintained through the different stages of a persistent prosecution, it may become a question with the Government whether it is worth their while to incur a further defeat in what at the best was at starting a very doubtful adventure. My object in placing this little treatise before the public is to contribute my mite towards the support of that side which I believe commands the sympathy of a majority of those who are capable of reasoning on the subject.

I have closely watched the contest between a hesitating and lukewarm prosecuting Government and a subject determined if possible to retain those rights to which he may well consider himself entitled in default of any previous judgment of a contrary nature having been inscribed in the annals of our legal courts. Government and subject are alike novices in the proceedings; both have to be taught what is the law and what the real construction to be placed upon the statute under which the action is laid, and to both will the ultimate decision be of vital consequence. Condemnation will render shipbuilding to the one a profession involving great doubts,

uncertainties, and frequent official interference; and acquittal will, we are told, compel Government to apply to Parliament for a measure which shall give them greater powers of molestation in that important branch of our trade.

It is not my wish to commit to print a series of egotistical remarks and opinions, but rather to gather from the copious arguments of Judge and Counsel what were the history and origin of the Foreign Enlistment Acts of England and America,* what precedents are available for our guidance, and how far the history, origin, and precedents may be applied to sustain the defence set up on behalf of the impounded ships.

VIGILANS.

January, 1864.

* I am indebted to the *Times* for the Report of the Trial, extracts, &c.

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CHAPTER I.

THE HISTORY, ORIGIN, AND OBJECT OF THE AMERICAN FOREIGN ENLISTMENT ACT.

THE early days of the American Republic were constantly troubled by questions of great difficulty. Frequent threats of secession, and actual insurrections at home, with foreign complications arising from the several treaties into which the young Confederation had entered, made the task of government one which few but a Washington could have successfully encountered. The great continental war then raging between England and her allies on one side, and France and her satellites on the other, rendered the existence of these treaties doubly perplexing. France, to whom the United States owed so much for their valuable and timely recognition and assistance, had fastened upon their Government a Treaty, an article of which forbade the enemies of France fitting out privateers in American ports.

M. Genet, the Minister of the French Republic to the United States in 1793, sought to interpret this article as allowing French privateers to be fitted out in those ports, and insisting on such an interpretation, he, on his arrival at Charleston, and before he had even given in his credentials to the President, authorized the fitting out and arming of vessels in that port, enlisting men, foreigners as well as citizens, and giving them commissions to cruize and commit hostilities against England, a State then at peace with America. The United States Government, of course, resisted any such interpretation of the Treaty, and asserted that whilst refusing the right to fit out privateers to any enemy of France, the article in question "did not give permission, either expressly or by implication, to France herself to fit out such ships against a power which, though hostile to France, was at peace with the United States." M. Genet, however, was ill-satisfied with such a view of the position, and, doubtless thinking that a sense of gratitude for past favours would cause the United States to grant to France what she persistently refused to other nations, continued to press his case, and, indeed, to proceed with his enlistments. But Mr. Jefferson, the American Secretary of State for Foreign Affairs, seeing to what complications such a line of policy would inevitably tend, resisted all

the threats and bombast of M. Genet, and sent orders to the American Minister at Paris to demand the recall of that gentleman. Meanwhile, Washington made an appeal to Congress in a most memorable message, which elicited the marked admiration of Mr. Fox in the House of Commons, and obtained as its result the passing of the first Foreign Enlistment Act of America, of which the 3rd, 4th, 5th, and 11th sections, being those which immediately concern the equipment of ships, are here given.

The 3rd section is—

If any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign Prince or State, or of any colony, district, or people, to cruize or commit hostilities against the subjects, citizens, or property of any foreign Prince or State, or of any colony, district, or people with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanour, and shall be fined not more than $10,000, and imprisoned not more than three years.

The 4th section is—

That if any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid or be concerned in the furnishing, fitting out, or arming any private ship or vessel of war or privateer, with intent that such

ship or vessel shall be employed to cruize or commit hostilities upon the citizens of the United States or their property, or shall take the command of, or enter on board of any such ship or vessel for the intent aforesaid, or shall purchase any interest in any such ship or vessel, with a view to share in the profits thereof, such person so offending shall be deemed guilty of a high misdemeanour.

The 5th section is—

If any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, or cruiser, or armed vessel in the service of any Prince or State, or of any colony, district, or people, or belonging to the subjects or citizens of any such Prince or State, colony, district, or people, the same being at war with any foreign Prince or State, or of any colony, district, or people with whom the United States are at peace, by adding to (augmenting, that is to say) the number of the guns of such vessel, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war, every person so offending shall be deemed guilty of a high misdemeanour, shall be fined not more than $1,000, and be imprisoned not more than one year.

The 11th section is—

That the collectors of customs be and they are hereby respectively authorized and required to detain any vessel manifestly built for warlike purposes, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner or owners to cruize or commit hostilities upon the subjects, citizens, or property of any foreign Prince or State, or of any

colony, district, or people with whom the United States are at peace, until the decision of the President be had thereon, or until a bond be given.

Such, then, are the history and origin of the American Act of 1794, which was superseded by an Act of 1818; though its provisions were all incorporated in that new Act, the wording of which is nearly similar to our statute, which is, indeed, all but a copy of its predecessor in the United States.

We have clearly seen that this Act of America was passed by Congress at a time of considerable political difficulty; and that though it was an extreme measure to be directed against a country to which America owed so much, yet it was demanded as a means of putting a check upon the French armaments of that day in United States ports; as a vindication of their neutrality between the belligerents; and, lastly, as a step to render illegal for the future all enlistment of American subjects to aid a foreign war, and the equipment and armament of any ship with a like personally hostile intent. It will be observed that the offence of M. Genet, leading to the passing of this measure, was that of enlisting American citizens for land and sea service, and fitting out and arming vessels in United States ports, and also providing commissions for such ships. No offence of either buying or building ships was alleged against M. Genet, and the actual omis-

sion of all reference to such acts in the statute can lead to but one conclusion. That the authorities did not deem such dealings calculated to lead to such complications as had arisen from the transactions of M. Genet; and that they, therefore, decided to consider them as legal, and exempt from prohibition.

Obviously, also, M. Genet, being in haste to form his expedition, could not have waited for the building of vessels, and, doubtless, selected those ready with crew and commander, and which would therefore require simply armament and commissioning. And so building being entirely out of the question, the chief commercial element was, doubtless, considered to be wanting to the transaction in the eyes of the United States authorities. The omission of any prohibition to build or sell a ship in the Acts both of England and America is very important, and a circumstance to which I shall again have occasion to refer.

I will only further say of the acts of M. Genet, that had the present American statute been then in existence, every one of its clauses would have been violated by him. The enlistment of American subjects, and the equipping and arming of French vessels in American ports, are evident violations of its letter and spirit. Neither of such transactions has the shadow of any commercial aspect,

and both have for their distinguishing feature the personal engagement of American subjects in a war with a State at peace with America. Had this personal engagement of American citizens and ships been dispensed with, had the French Minister contented himself with employing agents to purchase ships even equipped and armed, and had those agents dispatched the ships from the United States ports as a mere act of commerce, is it too much to assert that no interference of American authorities would have taken place, and that further and more mischievous enterprises must have been attempted before such a measure as their Foreign Enlistment Act would have been passed into law? But the position of the chief offender, the personal engagement of American subjects, and the combination of armaments in the United States, left the Government clearly no alternative but that of arresting now and for the future acts which had but one aspect, that of belligerent intent, and entirely lacking the least appearance or evidence of any commercial transaction.

CHAPTER II.

PRECEDENTS UNDER THE AMERICAN ACT, AND THEIR COMPARISON WITH THE CASE OF THE "ALEXANDRA."

IT seems to be admitted on all sides that as there has been no conviction sustained, nor indeed any case fairly brought to trial under the 7th section of our Foreign Enlistment Act, so there is no guidance for our judges in the shape of precedent under our Act. As it is also understood that our statute was formed by its framers on the American model, it is only fair to assume that American precedents are therefore of the greatest importance to our judges as beacons in waters not navigated by any of their predecessors. It says much for the adventurous character of Americans, that they, inhabitants of a country so vast, and offering such manifold opportunities of inland occupation, should have betaken themselves so freely to naval risks, and have thus furnished beyond any other country such frequent cases of interference in foreign naval warfare. Amongst these numerous records of judicial decisions are one or two bearing immediately on the case before us.

There is the decision on the *Santissima Trinidad*

in the Supreme Court, which is very important, and well worthy the careful consideration of those wishing to ascertain what was deemed legal and what illegal under the Act in the Courts of America.

This vessel was originally built and equipped at Baltimore as a privateer during the war between this country and America, and cruized against us. When peace was declared, she changed her rig and was sold by the then owners. In 1816 she was loaded with a cargo of warlike munitions by her new owners, who were American citizens, and being armed with 10 or 12 guns, which were a part of her original armament, she was sent from that port, under the command of the captain, Chaytor, *ostensibly* to the North-West Coast, but *in reality* to Buenos Ayres, a colony then in rebellion against the mother country, Spain. The supercargo had written instructions authorizing him to sell the vessel to the Buenos Ayres Government for a suitable price. She arrived at Buenos Ayres, having sailed under the protection of the American flag, but not having committed any act of hostility on the voyage. At Buenos Ayres she was sold to Captain Chaytor, then commanding her, and soon afterwards assumed the flag and character of a public ship-of-war, and was understood by the crew to have been sold to the Buenos Ayres Government. Captain Chaytor made the crew acquainted with

these facts, and informed them moreover that he had become a citizen of Buenos Ayres, and had received his commission to command the vessel as a national ship, and immediately invited the crew to enlist in the service, the greater part of whom enlisted accordingly.

Here, then, was a ship built and equipped and armed in the United States jurisdiction, manned and commanded by American subjects, and with a cargo of arms and munitions despatched from a United States port, with an *ostensible* destination to the North-West. She changes her course, however, to Buenos Ayres, then a belligerent State, where she is sold to a belligerent Government, and where her commander and great portion of her crew enlist and are commissioned in the service of that State, with the intent of their taking personal part in the hostilities then prevailing between the colony of Buenos Ayres and the parent country. Compare this case with that of the *Alexandra*, a ship in an incomplete state, without guns or any proof of the intention to mount guns, and without crew or commander.

Then let us ask ourselves which offence corresponds in the intent and equipment to those cases of personal engagement in hostilities which, as we have seen, led to the passing of the English and American Foreign Enlistment Acts?

If the equipment of the *Alexandra* merited the term warlike and its consequent penalties, what description will apply to that of the *Santissima Trinidad?* If the intent of the Messrs. Sillon, the claimants of the *Alexandra*, was one of a practically hostile nature, what legal epithet or penalty can fitly apply to the American owner, Captain Chaytor, and the crew of the *Santissima Trinidad?*

If the owners of the unarmed and unequipped *Alexandra*, in selling her clean-handed to the belligerent, are guilty of misdemeanour, are the owners in the American case quoted guilty of no greater crime in actually transferring to a belligerent service a fully-armed and American-manned ship-of-war?

Does this Act, in its very limited language, provide for two such extremely diverse cases? Let us read the judgment of the Supreme Court in this case, where it is alleged by the owners of the ships captured by this vessel, that such captures were invalid, on the ground of the original illegal equipment of the cruizer: —

"It is apparent," said Mr. Justice Story, in delivering the judgment of the Supreme Court, "that although *equipped as a* "*vessel of war*, she was sent to Buenos Ayres on a *commercial* "*adventure*, contraband indeed, but in no shape violating our laws "or our national neutrality. If captured by a Spanish ship of "war during the voyage, she would have been justly condemned "as a good prize for being engaged in a traffic punishable by the "law of nations. But there *is nothing in our laws*, or *in the law* "*of nations*, which forbids our citizens from *sending armed vessels*,

"as well as munitions of war, to foreign ports for sale."—7 Wheaton Reports, p. 283.

A later judgment of the same Supreme Court, in 1832, in the case of a vessel called *The Bolivar*, otherwise *Las Damas Argentinas*, is still more conclusive. That vessel had been fitted out and equipped at Baltimore by the defendant, John D. Quincy, and sailed from that port to the island of St. Thomas, in the West Indies, the owner and equipper, as he averred, intending when he left Baltimore to go in search of funds, with which to arm her and prepare her for a cruize as a privateer. Mr. Justice Thomson, in delivering the opinion of the Supreme Court to the effect that the jury ought to be instructed that the defendant was not guilty, if it should be of opinion that this averment was proved, said:—

"The offence consists principally *in the intention* with which the "preparations are made. These preparations, according to the "very terms of the Act, must be made within the limits of the "United States; and it is equally necessary that the intention "with respect to the employment of the vessel should be formed "before she leaves the United States. And this must be a fixed "intention, not conditional or contingent, depending upon some "future arrangements. This intention is a question belonging "exclusively to the jury to decide. It is the material point on "which the legality or criminality of the act must turn; and "decides whether the adventure is of *a commercial or warlike* "*character. The law does not prohibit armed vessels belonging to* "*citizens of the United States* from sailing out of our ports; it only "requires the owners to give security (as was done in the present "case) that such vessels shall not be *employed by them* to commit

"hostilities against foreign Powers at peace with the United States. "The *collectors are not authorized to detain vessels, although mani-* "*festly built for warlike purposes,* and about to depart from the "United States, unless circumstances shall render it probable that "such vessels are intended to be employed *by the owners* to commit "hostilities against some foreign power at peace with the United "States.

"All the latitude, therefore, necessary for commercial purposes "is given to our citizens, and they are restrained only from such "acts as are calculated to involve the country in war."

This case is even more to the point than the preceding one. Here is a ship fully equipped and manned with an American crew; she sails out of an American port with the avowed intention of privateering, not certainly at once, but at a date of a very indefinite nature. Here was the equipment proved and the ultimate intent avowed, in fact, a far stronger case than is presented in the meagre details attempted to be proved against the *Alexandra*, and yet we find recorded an acquittal on the ground that the actual present intent was not hostile.

The *intent* of the *owner* at the time of sailing was the thing to be ascertained as vitally essential to conviction, and that present intent, in spite of an averred future intent of hostile employment, was deemed harmless. Now, what present hostile intent resides in the minds of the present owners of the *Alexandra?* What practical and personally hostile intent have they? Are they masters of the intent to cruize or commit hostilities? The Attorney-

General allowed that he considered the Confederate Government as masters of the intent to cruize. But the Confederate Government cannot be reached by our Foreign Enlistment Act. It is but municipal, and applicable therefore to those only within our jurisdiction. But, says the Attorney-General, they have agents. Well, then, why are they not the objects of the prosecution, instead of those who merely follow their ordinary avocations of building, fitting, and equipping, all of which transactions are of a purely commercial nature? But these very agents are here only on a commercial errand, which may be designated as for the purpose of buying and in some measure superintending the building of ships. Granted even that Captain Bullock was eventually to command the *Alexandra*, — till that command was taken up, he could be guilty of no act hostile to any State. And, therefore, had the *Alexandra* when fitted and equipped sailed from our ports under the English flag and under English command, changing that flag and that command when beyond our jurisdiction, — what is the nature of her action, different to that of the *Santissima Trinidad* and *Bolivar*, that the one should be guilty and the others innocent? The owners, Messrs. Sillon, and others who are defendants in the action, would be asked their intent, and security would be demanded of them that *they*, *the owners*, did not

intend committing hostilities. They would when beyond our jurisdiction transfer their charge to the Confederate authorities, who would then hoist the Confederate flag (constituting, according to the best authorities, a perfectly valid commission), and the ship would then be the public ship-of-war, with all her rights of capture in possession. The English share in the transaction would have been that of building and equipping for sale; the builders might have had certain sympathies, but let the fact of a sale be proved, and their commercial and therefore innocent intent is beyond all doubt. The Acts of both countries were undoubtedly framed to prevent and prohibit overt acts of war by subjects against a State at peace with their Government, though at the same time every *commercial* transaction was to be free and unfettered even with belligerent states. These municipal statutes were to control the subject and prevent him being found either on land or at sea acting against a friendly State. But if the result of commerce was to put a belligerent in possession of a ship, the neutral could not be complained of by the other belligerent. If a war does not hinder, but much animate the trade of a neutral in warlike munitions, why should not the trade of a neutral in ships receive a like stimulus?

That Mr. Huskisson, the colleague of Mr. Canning, considered such a trade lawful, is evident from his

language in the House of Commons during debates on the subject. These precedents, however, distinctly show that the American judicial view of the law was this: That their subjects might sell ships-of-war to belligerents, and that every commercial transaction in ships was allowed; the things to be prevented and prohibited being personal service on board such ships, and the adding to the armament or warlike equipment of any belligerent vessel.

There is one more case to which I will refer, because important in connection with a certain charge made against the construction of the *Alexandra*. It was said that her bulwarks were stronger than usual in yachts or merchant-ships, and that she had two or more ports cut. The claimants of vessels captured by the ship *The Brothers* resisted the right of capture in the American courts, on the ground that *The Brothers* had had her armament augmented in an American port. It was proved and admitted that the ship had come into port, and had her waist repaired and two new ports cut in it. The Court, however, decided that this was not a sufficient alteration to render her guilty of a violation of the Act, and therefore condemned the captures.

These three important precedents have been naturally made available by the defence to prove what range of freedom in dealing with belligerents

has been allowed by the American courts. The prosecution attempted to reduce the importance of these cases in the eyes of the judges by asserting that they had been made too much of by their opponents. But I think that if these cases are to be slighted, it is equivalent to ignoring entirely the value of American precedent. But if, as I venture to think, precedents are generally eagerly looked for and embraced as guides to present proceedings, the value of these particular cases cannot be overrated. The very expression in the case of the *Bolivar*, that "all latitude necessary for commercial purposes is given to our citizens, and they are restrained only from such acts as are calculated to involve the country in war," seems to me to contain the essence of the judgment in the case.

Apply these remarks, as in common fairness they should be applied, to the case of the *Alexandra*, and allow commerce to have its sway, interposing with *ex-officio* authority when commerce ceases on the part of the subject, or of those within our jurisdiction, and such persons by personal interference in hostilities do that which, according to the preamble of the Act, "may be prejudicial to, and tend to endanger the peace and welfare of the kingdom."

America saw fit, during all the wars which found her neutral, to avoid passing in her judgments any hindrances on the commerce in ships of her sub-

jects. In the two cases of the *Santissima Trinidad* and the *Bolivar*, where, short of actual hostilities, the points in evidence were as strong as could be; the commercial act intervening in the one, and the absence of actual and personally present intent in the other, secured acquittal. Why is the law, the identical law then in action, to be now strained, if not indeed perverted, against our subjects at the instigation of the partizans of those whose judges have left such decisions on record? Let our commerce be as free as theirs then was, and let official interference be stayed till such time as offences are perpetrated similar to those which brought the Acts of England and America into being.

CHAPTER III.

HISTORY, ORIGIN, AND OBJECT OF THE ENGLISH FOREIGN ENLISTMENT ACT.

OUR English Statute, like its predecessor the Act of America, had its origin in certain doings of our subjects, which were so evidently acts of open war against a friendly Power, that no government could fail to see the necessity of stopping such proceedings, which if passively allowed by it would have had the effect of placing this country in a most anomalous position. Whilst the Government would have been nominally and indeed really at peace with Spain, its subjects would have been carrying on a war with that country by evincing active sympathy with her rebels and supporting that sympathy by armed expeditions.

In 1817 the Spanish colonies in South America were in rebellion against the mother country. Great sympathy existed in this country with that rebellion, and the assistance rendered by our subjects was soon of so open a character as to lead to remonstrances from Spain.

We added an article to the Treaty of Friendship of 1814 with that country, binding ourselves to take

stringent measures to arrest this assistance from British subjects. To give effect to this article a proclamation was issued forbidding the furnishing of supplies to both belligerents, *i.e.*, Spain, and her colonists who were now in such force as to possess the character of a Government *de facto*. In 1818, however, great doubts arose as to whether the municipal laws of Great Britain then in existence applied to Governments which were unacknowledged amongst the Powers of the world, and whether British subjects granting assistance to the colonists were liable to the penalties named in the statute law. It became necessary, therefore, to remove all doubt in the matter by remodelling the laws then existing. Another object was also to be obtained by so doing. Under the old common law the offence of enlisting in foreign service without licence was punishable with death. The severe nature of the penalty caused juries to view with great clemency parties charged under the statute, and no convictions were therefore sustained. The severity of the law was thus the bar to its enforcement, and to modify this, and introduce a clause applicable to unacknowledged Powers, was therefore the aim of our legislators. In 1819 the new Foreign Enlistment Act was passed. With its general features the reader is doubtless familiar, and it will therefore be sufficient for my purpose to give at length merely that section which bears on the cases in point.

The 7th section stands thus :—

That if any person, within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province, or people, as a transport or storeship, or with intent to cruize or commit hostilities against any Prince, State, or potentate, or against the subjects or citizens of any Prince, State, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country, with whom His Majesty shall not then be at war ; or shall within the United Kingdom, or any of His Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to His Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, any such person so offending shall be deemed guilty of a misdemeanour, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the Court in which such offender shall be convicted ; and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of any such ship or vessel shall be forfeited ; and it shall be lawful for any officer of His Majesty's Customs or Excise, or any officer of His Majesty's navy, who is by law empowered to make seizures for any forfeiture incurred under any of the laws of Customs or Excise, or the laws of trade and navigation, to seize

such ships and vessels aforesaid, and in such places and in such manner in which the officers of His Majesty's Customs or Excise and the officers of His Majesty's navy are empowered respectively to make seizures under the laws of Customs and Excise, or under the laws of trade and navigation; and that every such ship and vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which may belong to or be on board of such ship or vessel, may be prosecuted and condemned in the like manner, and in such courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of Customs and Excise, or of the laws of trade and navigation.

The difference between this clause and the Equipment clause in the American Act is more grammatical than substantial, consisting of the position of the word "shall," which in the American Act stands, "If any person shall," &c., and not, as in the English Act, after "If any person in any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, *shall*," &c. This distinction is so far important as making it appear that one Act demands as necessary to conviction that the person shall be within the jurisdiction when he commits the offence, whilst the other would require specially that the offence shall be committed within the jurisdiction. But as it is evident that the person and the offence must be coupled, it follows that conviction in either case could only ensue when both person and instrument of offence were within jurisdiction, thus rendering the position of the word "shall" of merely minor consequence. The demand

for our Act then clearly arose from the necessity of stopping certain personal engagements of our subjects in foreign wars. The words of that able statesman, Lord Castlereagh, in the debate that ensued on the question, put before the House a state of things too plainly calling for instant interference. "Not only officers in small numbers went out to join the insurgents' corps, but there was a regular organization of troops, regiments regularly formed left the country, ships of war were prepared in our ports, and transports were chartered to carry out arms and ammunition."

Here was that combination of armaments of which Mr. Canning spoke when referring to the complaints of Turkey, of the assistance given to the Greeks by Lord Cochrane. But in the offence to which Lord Castlereagh alluded there were no allegations of sale or building, but positive personal interference in war by the subject, and as the Act passed to suppress these very interferences in war by the subject contains no reference to selling or building, we may again fairly draw the inference that such acts were not designated as illegal by the framers thereof, either because not present to them in the offences aimed at and complained of, or because they were not deemed of sufficiently hostile a nature to demand prohibition.

And let it be observed that in none of these offences which so plainly called for suppression at

the time of the passing of the measure was there the faintest trace of any commercial transaction. Enlistments, personal equipment, and the arming and commissioning of ships were the acts indicated as taking place, and as being calculated to draw this country into actual war. There is peculiar significance in the fact that the causes of the origin of the English and American Acts were identical. They may be described as having been in both cases brought about by the *personal* participation in hostilities of subjects who, in regiments and on board ships, formed a substantial aid to those warring against a country at peace with their respective Governments, and in which expeditions no element of a commercial transaction could be descried or pretended. Is such a state of things before us now? Had the present transactions—those of *sale* of ships to belligerents—been the only ones in those days, should we have had in 1818 and 1819 two such Acts passed in America and England as those now the subject of such frequent reference? Ascertaining thus from debates and precedents what were the intentions of the framers, do not our Government unfairly strain, nay seek to misinterpret, to the disadvantage of many of our subjects and the weaker side in the war, these measures, which were passed to suppress a far greater and very different source of aid to a belligerent?

CHAPTER IV.

WHAT IS NECESSARY TO CONVICTION UNDER THE SEVENTH SECTION OF THE BRITISH FOREIGN ENLISTMENT ACT.

THREE things must of necessity be proved against any one indicted under the 7th section of this statute ere conviction can be said to be established. Ownership, equipment, and intent must be conclusively shown to exist in the person of any one charged with committing the misdemeanour; and these facts must be proved conjointly, inasmuch as ownership or ownership with equipment, but without intent, is clearly no offence under the statute. "To equip with intent" is prohibited, and not simply to equip. What then can be the position of one who equips and sells to a party who then carries out the hostile intent? If to equip with intent to employ in foreign service, or with intent to cruize, is the actual offence aimed at, and which plainly assumes the personal engagement in hostilities of the equipper, and presumes the absence of any commercial act on his part, then how, under the same statute, can it be said to be an offence of an equally grave nature to equip with intent to sell, indifferent as to the use made of the ship equipped? If a person can buy a

ship ready made and equipped, having the intent to employ that ship in hostile acts, and yet commit no offence under the Act, it seems hard indeed that to equip a ship with a purely commercial intent should be deemed an offence, and one to be visited with forfeiture of the ship and the imposition of fines.

The intent aimed at by the original framers of the statute would in all fairness lie with the holder of the ship intent on hostile acts, and not on the builder and equipper, who merely follows his customary avocation of ship-building, agreeable to build and equip for either of two belligerents that will pay the price. If the statute is thus interpreted, we could well consider our duty as a neutral performed when we had prevented our subject engaging in personal service either by land or sea against a state at peace with us. "Your trade," we should say to him, "is to build and sell; if you adhere to that we do not interfere; if, however, you build, equip, and devote to foreign service without sale, thereby positively yielding your personal assistance in the service of a belligerent, we deem that a clear violation of the statute, which forbids you equipping with intent, or in order to employ in foreign service, or with intent to cruize or commit hostilities against a State at peace with your Government." If selling a ship, armed or unarmed, was when the Act was passed considered criminal, it is very strange, to say the

least, that that statute records no evidence of such a conclusion. But if we find that under the American Act several judgments have been given which in plain language allowed the sale of armed vessels as legal, and if we consider that no judgments at all have been given under our Act, but that that Act is exactly similar in its provisions to the American, we can but come to the conclusion either that the American judges were wrong in their interpretation of their Act, and are therefore not to be followed by us, or that they were right in their construction and interpretation, and have thereby afforded precedents for our guidance, which we are not only justified in quoting, but are bound to follow. Indeed it seems almost providential that we should be able to confront a State demanding a strained and even erroneous interpretation of a statute in their behalf, with so many and weighty examples of a contrary construction by the very highest judges and courts of that very State. It is advanced as strong argument for a concession to their demands that our interests in any future war in which we might be engaged would be benefited by our affording a precedent of this nature. But, supposing a war to take place some years hence, would not America elect to refer to those precedents provided by her own courts rather than to those partially constrained judgments of ours? Most surely that country which has shown

itself, as in the *Trent* affair, only open to conviction when compulsion takes the place of persuasion, would so far consult its interests as to select those precedents best suited to the furtherance of those interests, and then would be seen the absurdity of our having sacrificed existing law to fancied expediency in the vain hope that we should in our day meet with a like return. Let the law now be carried out as that law stands revealed to us by the light of the intentions of the framers of it. If it is found that the present law is powerless against the building and sale by a shipbuilder, and that expediency and a view to future interests demand an alteration of the law in the shape of more stringent measures, by all means let that important amendment be attempted. But let that alteration be effected not by one nation, which, whilst yielding to the demands of a belligerent State in that respect, may meet with no such indulgence when she herself is belligerent, but by a Convention, such as met at Paris in 1856, when questions of the greatest importance were then arranged and settled. It cannot be for the future welfare of this country that we should now pass exceptional laws peculiar to ourselves, and entailing great hardships on a large portion of our subjects, in the pure faith that we shall reap our benefit when we ourselves are belligerent and to some extent at the mercy of neutrals. Rather let the moot points

be the subject of immediate conference in a comity of the leading nations, and if necessary a fresh series of international laws be passed, and which would therefore be binding on all.

CHAPTER V.

THE TRIAL OF THE "ALEXANDRA."

THE public are sufficiently familiar with the general details of this case to render unnecessary more than a very brief recapitulation of the events which led to the trial of the ship. It came to the ears of certain Federal agents and partizans in this country that the said vessel was supposed to be building for the service of the Confederates. By means of spies and the employment of the worst class of informers, they obtained just sufficient information to furnish matter for an affidavit, under which the authorities appear to have felt called upon to make the seizure and proceed to prosecution. The vessel was taken when in the possession of Messrs. Sillon, engineers, who were engaged in fitting the engines to the ship. The Messrs. Sillon were the nominal defendants in the action and put in a claim with certain others to the ownership of the vessel. The trial took place on the 22nd of June, and lasted three days. The result was a unanimous and immediate verdict of acquittal. The Attorney-General tendered a bill of exceptions, about which there was considerable cavilling. The Lord Chief

Baron who tried the case said, prior to the verdict, that he would accept any bill of exceptions that was tendered; but when they were handed to him, he found that in them was asserted that he had laid down the law, and that erroneously, and that under his ruling the jury had returned their verdict, and that thus the Government were entitled to a new trial, on the grounds of misdirection and on omission of direction on certain points. The Lord Chief Baron replied that he had distinctly avoided laying down any law on the point to the jury, but had put the question of law to them in the very words of the Act. He refused to receive such a bill of exceptions; and after an animated discussion, it was decided that counsel should be heard on both sides to show cause why a new trial should or should not be held. After five days' argument the case was again adjourned, the judges taking time to consider their judgment.

On the actual trial the weakness of the prosecution was evident from the first. This was not, it must be remembered, an ordinary *ex officio* prosecution originating with the Government; it was, on the contrary, a case of the North pitted against the South. The Emancipation Society and other partizans of the Federals set themselves to work to find out and even invent information concerning these ships; and to procure even this doubtful evidence, they were compelled to have recourse to the services

of the worst class of informers, and even with such aid they received from Earl Russell direct assertions that they had but furnished him with the most insufficient data to go upon. This, then, was essentially an aggressive prosecution by a certain set of partizans against shipowners and builders who in their ordinary trade and avocation had provided the South with ships. Such a prosecution to be successful should ever have witnesses in support of it who can stand reasonable scrutiny as to character and antecedents in the witness-box. Love of fair play has always so much weight (thank God!) with an English jury that they are ever prepared to give the prisoner, or weaker party, the benefit of the least doubt. None can deny that from the loose manner of giving evidence, and the generally incredible nature of that evidence when given, of some of the most important witnesses, those doubts were presented to the minds of the jury. There were witnesses only on one side, that of the prosecution. Four of them were discharged or discontented workmen previously employed in yards connected with the defendants; one was a confessed spy of the worst order; one was the notorious informer who had been Federal, Confederate, and Federal again, and in each case for the sole sake of filthy lucre, and had called down from Sir H. Cairns the well-merited declamation of that learned gentleman. The

remainder were highly respectable witnesses, whose evidence, however, was of a purely technical and comparatively immaterial nature. Sir Hugh Cairns, scorning the attendance of witnesses, depended entirely upon the strength of his arguments, founded, as he knew they were, upon precedent, law, and justice. The weakness of the prosecution, of which he was well aware, was as good to him as a dozen valuable witnesses on his side.

The Lord Chief Baron summed up, remarking, "that it was admitted that the vessel was not "armed, that the question, therefore, was whether "the preparation of this vessel in its then condition "was a violation of the Foreign Enlistment Act, "and whether under the 7th section the vessel as "then prepared at the time of seizure was liable to "seizure. He protested against the doctrine that "no man is to be convicted of any crime if there is "any possible solution of the circumstances by an "imagination of his innocence, but that there must "at all times be a thorough sober persuasion and "satisfaction with respect to the guilt of the party "accused, and undoubtedly you must act upon "proof, and not upon suspicion." His Lordship then read passages from Storey and others, showing that "when two belligerents are carrying on war "a neutral power may supply, without any breach "of international law, and without a breach of

" the Foreign Enlistment Act, munitions of war, " gunpowder, every description of arms, everything " in fact, that can be used for the destruction of " human beings." " Why," said his Lordship, " should ships be an exception? I am of opinion " in point of law they are not. The question " I shall put to you is, whether you think that " vessel was merely in course of building in pursu- " ance of a contract that was perfectly lawful, or " whether there was any intention in the port of " Liverpool or any other port of England, that the " vessel should be fitted out, equipped, furnished, " and armed for purposes of aggression. Surely, " if Birmingham may supply munitions of war of " various kinds, why object to ships? Why should " ships alone be in themselves contraband? I asked " the Attorney-General whether a man could not " lawfully make a vessel intending to sell it to either " of the belligerent powers that required it, and " which would give the largest price for it? To my " surprise the Attorney-General declined to give an " answer to the question; which I think a grave " and pertinent one. But you, gentlemen, are " lawyers enough, I think, to know that a man may " make a vessel and offer it for sale. If a man may " build a vessel for the purpose of offering it for " sale to either of the belligerents, may he not " execute an order for it? That appears to me to

" be a matter of course. The *Alexandra* was clearly " nothing more than in the course of building; if " you think, therefore, that the object really was to " build a ship in obedience to an order, in compli- " ance with a contract, leaving those who bought it " to make what use of it they thought fit; it " appears to me that the Foreign Enlistment Act " has not been broken, but if you think that the " object was to furnish, fit out, equip, and arm that " vessel at Liverpool, that is a different matter."

The jury immediately returned a verdict for the defendants.

CHAPTER VI.

THE HEARING BEFORE THE FULL COURT.

SIR HUGH CAIRNS first drew attention to what he deemed the proper construction to be placed upon the Act, then to the evidence in the case, and lastly, to the charge of the Lord Chief Baron. He recounted the history of the Act, quoting Kent's Commentaries on the question of dealings in contraband by neutrals with belligerents; and on the question of overt acts of hostility by belligerents within neutral territory, and referred to this latter subject to refute the assertion of the Attorney-General, who, when the Lord Chief Baron gave it as his belief that the statute was partly passed to obviate the possibility of two ships belonging to two belligerents being equipped in one of our ports, and commencing hostilities within our waters, stated that "such a state of things had never entered into the mind of any human being." Sir Hugh Cairns showed by these quotations that Lord Stowell and Chancellor Kent had both taken into consideration such a probability.

He then referred to the history of the American Act, which he said was taken by our legislators as

a model. He stated at length what were the different sections of the American Act. He referred specially to the 3rd section as corresponding with our 7th; to the 5th, forbidding the augmenting of the armaments of a ship of war in the service of a belligerent State.

He then passed to the 11th section, which authorizes the collectors of customs to detain vessels manifestly built for warlike purposes, "when their cargoes shall consist of arms and munitions of war, or when the number of men shipped, and other circumstances, make it probable that the owners intend to employ such vessel to cruize or commit hostilities."

He then cited a case in Bee's Reports, page 76, where the ship *Brothers*, a privateer, after an action at sea, goes into an American port, is refitted, and has a new waist and two new ports cut, but which the judge decided was no sufficient alteration within the meaning of the Act to render her captures invalid.

Sir Hugh then quoted Kent, vol. i., p. 122:—

"The Government of the United States was warranted by the "law and practice of nations in the declarations made in 1793 "of the rules of neutrality, which were particularly recognised "as necessary to be observed by the belligerent powers in their "intercourse with this country. These rules were that the "original arming or equipping of vessels in our ports by any of "the powers at war for military service was unlawful, and no such "vessel was entitled to an asylum in our ports. The equipment "by them of Government vessels of war, in matters which, if done

"to other vessels, would be equally applicable to commerce or "war, was lawful. The equipment by them of vessels fitted "for merchandise and war and applicable to either was lawful, but "if it were of a nature solely applicable to war, it was unlawful. "And if the armed vessel of one nation should depart from our "jurisdiction, no armed vessel, being within the same and belong- "ing to an adverse belligerent power, should depart until twenty- "four hours after the former without being deemed to have violated "the law of nations."

This is an authority which will connect us with the whole chain I have given, first the declaration and then the Act of Congress, showing that the declaration and the Act of Congress were simply an affirmance of the rule of international law. Having turned aside for a moment, I now return to the next case upon this Act in the American authorities. There was a trial for a misdemeanour under this Act in the year 1795, reported in Wharton's "American State Trials," page 93. The questions were whether there was an equipment within the terms of the Act of Congress within the American jurisdiction, and the other was whether there was an intent on the part of Quinet, the prisoner, to join in using the ship as a privateer. The indictment was that he was concerned in furnishing, fitting out, and arming a certain vessel or ship called *Les Jumeaux*, lying at the port of Philadelphia. The evidence went to show that the vessel had four iron guns, with carriages, her whole appearance changed from what she had been, twenty ports open, and a crew of between thirty and forty on board. Quinet was convicted. The attorney for the States contended that, being converted from a merchant vessel carrying a few guns for self-defence into a privateer armed for hostilities, it was clearly an original outfit within the meaning of the law. Mr. Justice Patteson, in summing up, after going into the evidence, said :—

"If the equipments were not to be used for merchandise, the "inference was inevitable that they were to be used for war. No "man would proclaim from the housetop that he intended to fit "out a privateer; the intention must be collected from all the

"circumstances of the transaction, which the jury will investigate, "and on which they must decide. But if they are of opinion "that it was intended to convert this vessel from a merchant ship "into a cruiser, any man who was knowingly concerned in so "doing is guilty in the contemplation of the law."

The warlike equipments are superadded at last, and at last the judge and all the counsel agreed to take the case as turning on that, using the words of the judge, whether there had been a conversion of the ship into a ship of war by virtue of those equipments. Here is a case in which, if the argument suggested on the other side were to prevail, the court and all the counsel were occupying themselves in the most unnecessary and superfluous way it is possible to imagine. If it be right, that if you equip in any way within the dominions a ship as to which there is an intent at some time to convert her into a vessel of war, you commit an offence, what on earth was the use of the elaborate evidence produced in the case, and the consideration the judge gave to it to show that the equipment was of a warlike nature? because that is the point to which all parties addressed themselves to consider.

Sir Hugh then reverted to the history of the English Act. In quoting Alison's "History of Europe" he said:—

In the first volume of his second "History of Europe," sect. 95, he refers to the very great popular excitement in the year in which this Act was passed, and the circumstance of the Spanish colonies having revolted from the mother country, and states that, from the strong sympathy felt in this country with the revolted colonies, both naval and military equipments were being prepared to assist them. A British adventurer, who assumed the title of Sir M'Gregor M'Gregor, collected a considerable expedition in the harbours of this country, with which, in British vessels and under the British flag, he took possession of Porto Bello, South America, then in undisturbed possession of a Spanish force, a country at peace with England. This aggression led to

remonstrances by the Spanish Government, and in consequence the Government brought in a Foreign Enlistment Bill, which led to violent debates in both Houses of Parliament. Alison goes on to show to what extent this matter had gone in Ireland, referring to debates in Parliament, and the doctrines laid down by Martens, the international writer, which Lord Lansdowne had referred to. Having read the extract from Alison, Sir Hugh said,—The same state of things is described by Mr. Canning himself in these words :—

"What would be the result if the House of Commons refused "to arm Government with the means of maintaining neutrality? "Government would then possess no other power than that which "they exerted two years ago, and exerted in vain. The House "would do well to reflect seriously on this before they placed "Government in so helpless a situation. Did the Hon. and "learned gentleman really think it would be a wholesome state of "things that troops for foreign service should be parading about "the streets of the metropolis without any power on the part of "Government to interfere with it? At that very moment such "was the case in some parts of the empire, and he had little "doubt that in a very short time the practice would be extended "to London.

"It was extremely important for the preservation of neutrality "that the subjects of this country should be prevented from "fitting out any equipments, not only in the ports of Great "Britain and Ireland, but also in the other ports of the British "dominions to be employed in foreign service. The principle in "this case was the same as in the other, because by fitting out "armed vessels, or by supplying the vessels of other countries "with warlike stores, as effectual assistance might be rendered to "a foreign Power as by enlistment in their service. In this "second provision of the Bill two objects were intended to be "embraced—to prevent the fitting out of armed vessels, and also "to prevent the fitting out or supplying other ships with warlike "stores in any of his Majesty's ports. Not that such vessels

"might not receive provisions in any port in the British dominions, "but the object of the enactment was to prevent them from "shipping warlike stores, such as guns and other things, obviously "and manifestly intended for no other purpose than war."

This, said Sir Hugh, was the evil they had to guard against—a state of things in which they had the enlistment and the parading through the streets of men in military assemblage, and the supplying of ships with equipments which are of a warlike character, guns, and matters *ejusdem generis*, with which the ship would be more or less able to commit hostilities the moment she left the neutral country. Remarking on the absence in the Act of any prohibition to build, Sir Hugh said it was a perfectly just assumption that such absence led to the belief that the section intended that prior to ascertaining whether or not the offence of equipment had been committed, it should be shown that a vessel existed—that there is a ship spoken of which is to be equipped. He referred to the forfeiture clause as carrying out this assumption. Sir Hugh then completely overthrew the argument on the other side, that if a keel was laid down of a kind more or less fitted for a ship of war, such keel would be liable to seizure. This, as he showed, would be absurd, for how could the keel be that equipment or attempt at equipment of a ship spoken of in the Act, when there was in reality as yet no

ship that could carry such equipment? Sir Hugh then, dwelling on the fact that the terms equip, furnish, fit out, and arm, were all *diversi generis* not *ejusdem generis* with ship-building, asserted that this was further evidence that the framers of the Act never intended the prohibition of ship-building.

Adverting to the *Terceira* affair of 1830, in which some Portuguese refugees came to this country, obtained a ship at Plymouth, and having exported, in another vessel, arms and equipments, transferring them to their own vessel when at sea, Sir Hugh remarked that our Government were then very annoyed at the transaction, and gave directions to ships of war to intercept the vessels and fire on them, which was done in the waters of Terceira. Mr. Huskisson, in his place in Parliament, a Minister who had taken a part in the passing of the Act, and was, indeed, a colleague of Mr. Canning's, said on that occasion:—

"It might be supposed from my right hon. friend's remarks that "during the fifteen years we have been at peace our neutrality had "never before been violated. Has my right hon. friend forgotten "the repeated complaints made by Turkey, and has he forgotten "that to these complaints we constantly replied, 'We will pre- "serve our neutrality within our dominions, but we will go no "further'? Turkey did not understand our explanation, and "thought we might summarily dispose of Lord Cochrane and "those other subjects of his Majesty who were assisting the "Greeks. To its remonstrances Mr. Canning replied (and my "right hon. friend being then a colleague of Mr. Canning must

" be considered to be a party to his opinions), ' Arms may leave this
" ' country as a matter of merchandise, and however strong the
" ' general inconvenience, the law does not interfere to stop them.
" ' It is only when *the elements of armaments are combined* that they
" ' come within the purview of the law, *and if that combination*
" ' *does not take place until they have left this country we have no*
" ' *right to interfere with them.*' Those were the words of Mr.
" Canning, who extended the doctrine to steam-vessels and yachts
" that might *afterwards be converted into vessels of war*, and they
" appear quite consistent with the acknowledged law of nations."

These cases, then, said Sir Hugh, of the *Terceira* affair and Lord Cochrane's interference in the Greek rebellion, are just those instances in which, had the doctrines now put forward been then held, the Government would have had the right to interfere, and to prosecute to conviction the offenders.

Sir Hugh then referred to the cases of the *Oreto* and *Alabama*, and taking that of the *Oreto* first, said:—

This is the statement which I find made in Parliament by one of the advisers of the Crown with regard to the *Oreto*, and it will be a statement, I think, bearing directly upon the view taken of the construction of the Act of Parliament. " The *Oreto*," says the Solicitor-General (Sir Roundell Palmer) in Parliament upon the 11th of March in this year, " was made the subject of due
" representation only once before she left this country, because she
" sailed from Liverpool on the 22nd of March, clandestinely, as
" did the *Alabama*, and it was only on that same day that a con-
" versation took place between Mr. Adams and Lord Russell,
" which might have led to her detention if she had not gone. On
" the 18th of February the first and only previous information
" communicated to our Government was given by Mr. Adams. He
" stated a case which clearly called for inquiry. The Commis-

" sioners of Customs were directed to make an inquiry ; they did " so, and on the 22nd of February they reported that circum- " stances worthy of credit tended to show that the *Oreto* was going, " or at all events was credibly represented to be going, to Italy, " and not to America, and not a particle of evidence had been " offered to the contrary. She was not then fitted for the reception " of guns, and had nothing on board but coals and ballast. There " was consequently nothing to justify her detention—nothing but " vague rumours and suspicions. No further representation was " made, and the *Oreto* sailed on the 22nd of March. What " then happened ? The circumstances of her departure, and the " contemporaneous representation made by Mr. Adams to our " Government, made it probable that she was really intended for " the Confederate States, and that our officers had been imposed " upon. Still the case was not clear ; there was nothing proved " to have been done in England which a court of law would " certainly have construed as a violation of the Foreign Enlistment " Act. Nevertheless, our Government immediately sent orders " to Nassau, whither she was understood to have gone, and when " she arrived there she was watched. Upon the appearance of " a delivery of stores, which appeared to be munitions of war " into the *Oreto* while in our waters, although the case was " doubtful, and it was questionable whether the evidence would " prove sufficient, still, to show our good faith, we strained a point, " and, acting upon some evidence, the *Oreto* was seized. What " was the result ? She was tried and acquitted, the evidence not " being sufficient."

Now my observations upon that are these. Here is a statement that the *Oreto* left Liverpool ; that at the time when she left Liverpool she had no warlike equipment on board, but of course, from the nature of the case, she was prepared and able to sail away from Liverpool. She came to Nassau ; she is still within our jurisdiction. Before she came to Nassau it has become clear that she was not going to Italy, where she had been said to be going originally. The circumstances were supposed to be

sufficiently clear to justify a case made that she was going to be employed by the Confederate powers. What is the course taken? Do they say, the mere fact that she was able to sail away from Liverpool—the mere fact that she had on board those appliances which would enable her to sail from the port of Liverpool, although she had no warlike equipment on board, will be enough when coupled with the intent to be employed in a particular way, of which we now have evidence? Nothing of the sort. The *gravamen* of the charge is that she took in munitions of war while in the waters of Nassau. I desire to put it no further than it ought properly to be put. I say that that is clearly a statement that the view taken by those who took proceedings against the *Oreto* was that, short of something that could be called a warlike preparation, they could not institute proceedings against the ship; that there was nothing which amounted to a warlike preparation until she came into the waters of Nassau, and it was in respect of that preparation that she was seized. The *Oreto* was tried at Nassau, in the Vice-Admiralty Court, and was acquitted. Now, the case of the *Alabama* was dealt with at the same time, and the facts respecting it I am willing to take in the same way and upon the same statement. Now, with regard to the *Alabama*, I find this:—

"On the 1st of July the Commissioners made their report to "Lord Russell. They said it was evident the ship was a ship of "war. It was believed, and not denied, she was built for a foreign "Government, but the builders would give no information about "her destination, and the Commissioners had no other reliable "source of information on that point. Were our Government "wrong in not seizing the vessel then? The circumstances dis-"closed in the case tried before Justice Story were so far exactly "the same as those which occurred in the case of the *Alabama*, "and, in the absence of any further evidence, the seizure of that "ship would have been altogether unwarrantable by law. She "might have been legitimately built for a foreign Government, "and, though a ship of war, she might have formed a legitimate

"article of merchandise, even if meant for the Confederate "States."

I will now refer to another part of the same speech :—

"What is alleged against us? What is the extent of the acts "committed, even by individual subjects of this country, which "can be considered contrary to any law of our own? Why, the "building of these two particular ships. If our law failed to "reach them, while they were within our jurisdiction, and if "nothing was done by them in our ports or in our waters which "was against international law, how can we be held responsible "for their subsequent proceedings when on the high seas? It was "not till the *Alabama* reached the Azores that she received her "stores, her captain, or her papers, and that she hoisted the "Confederate flag. It is not true that she departed from the "shores of this country as a ship armed for war."

I do not, said Sir Hugh Cairns, understand language if that does not mean that the point in the case with regard to the *Alabama* was this: that although there might have been evidence (perhaps not conclusive, but still evidence sufficient to launch a case) as to the intent with which she left our shores, still there was that wanting which bore upon the other, and equally essential, part of the case. She did not leave our shores as an armed vessel, and more than that, she did not receive anything which could be called warlike equipment until she had reached the Azores. But, my Lords, the matter regards a subject of history with reference to the *Alabama* which is made plainer still, because after this statement of the course pursued with regard to the *Alabama* was made, and before the seizure of the *Alexandra* took place, and when certainly the public mind was anxious to know what was the line of duty which subjects of this country should pursue upon matters of this sort, I find that this statement was also made with regard to the *Alabama*. The Prime Minister, a fortnight after the statement which I have already read, said this—I refer to the 170th volume of the *Parliamentary Debates*, and to the debate of the 27th of March, 1863 :—"I have myself

"great doubts whether if we had seized the *Alabama* we should "not have been liable to considerable damages. It is generally "known that she sailed from this country unarmed and not "properly fitted out for war, and that she received her armament, "equipment, and crew in a foreign port. Therefore, whatever "suspicions we may have had (and they were well founded as it "afterwards turned out) as to the intended destination of the "vessel, her condition at that time would not have justified a "seizure." Now, the distinction is as clearly drawn as words can draw it between the intended destination, as to which there might be some suspicion, which would be matter of evidence, and that which was a fact *patens ad oculos*,—namely, the condition of the ship. And here is a statement, made by those who had considered the authority of an Act of Parliament of this kind, that a ship not fitted out with a warlike equipment when she leaves this country, whatever our suspicions may be with respect to her destination, cannot be made the subject of seizure, because her condition is not such as is pointed at by the Act of Parliament.

Sir Hugh then, after reference to the admission of failure on the part of the Attorney-General to connect the guns, assumed to be for the *Alexandra*, with that ship, went into the evidence depended on by the Crown, that part relating to the intent. He again referred to the case of the *United States* v. *Quincy*, where—

The Court thought in that case that instructions ought to be given to the jury that the offence consisted principally in the intention with which the preparations were made—and they must be made according to the Act within the limits of the United States, and that the intention, which must be a fixed one, not conditional or contingent, should be formed before she left the United States. The intention belongs exclusively to the jury to decide. It was the material point on which the legality or criminality

must turn and decided, whether the adventure was of a commercial or warlike character. Now said Sir Hugh, I will show the view taken of the intent in the present case by the Attorney-General at the trial. He said the intent must be an intent of one or more, having at the time the means and opportunity of forwarding or furthering such intention by acts. By intent undoubtedly the Act means practical intent. It was for the Crown to make out their case. We maintained at the trial that the evidence did not support their case. We challenged the credit and credibility of the witnesses examined on the trial, and we had good cause for doing so. The learned counsel went through the evidence generally in the whole case, arguing that it had failed in every particular.

Sir Hugh then went at some length into the evidence given by the several witnesses at the trial as well as into the character of that evidence, contending that the major part of it was extremely unsatisfactory, and that under any circumstances it could not have justified the jury in finding for the Crown. It was for the Crown in a case of forfeiture to prove their case with a reasonable certainty. The question of intent was one for the jury, and if they arrived at the conclusion that the intent had not been made out, they were clearly warranted in giving the verdict they had. Sir Hugh then came to the point of the direction of the Lord Chief Baron. From that direction he deduced four propositions :—

1st. That to build a ship as distinguished from equipping, fitting out, furnishing, or arming one, is not an offence under the Act.

2nd. That the *Alexandra* was not armed, and that

it was for the jury to say whether she was equipped, &c., or intended so to be, within the Queen's dominions.

3rdly. That the equipment, &c., must be of a warlike character; and

4thly That it was for the jury to say whether they considered there was any intention to employ the ship to cruize or commit hostilities at all.

Sir Hugh then in support of his first proposition quoted the Lord Chief Baron and his charge, who after referring to "Story and Kent," says :—

These gentlemen are authorities which show that where two belligerents are carrying on war the subject of a neutral power may supply to either, without any breach of international law, and certainly without any breach of the Foreign Enlistment Act (and it does not say a word about it), all the munitions of war, gunpowder, every description of fire-arms, cannon, every kind of weapon—in short, whatever can be used in war for the destruction of human beings who are contending together in this way. But, gentlemen, why should ships be an exception? In my opinion, in point of law, they are not. Presently, I shall have to put to you the question of fact about the *Alexandra*, which you will have to decide. The Foreign Enlistment Act it is now necessary for me to advert to, in order to tell you what is the construction which I put on the 7th section, which alone we have to do with on the present occasion.

It is clear that his Lordship speaks of ships being built, as distinguished from whatever might be meant by equipping, furnishing, fitting out, and arming. His Lordship says in another part of his charge, which I will read to you :—

"Now, with respect to the question of building, it is certainly "remarkable that there is not a word said about it. It is not

"said that you may not build ships for the belligerent power "There is nothing suggested of the kind, and clearly, by the "common law and by the messages I have read to you, surely, if "from Birmingham either state may get any quantity of "destructive instruments of war, and if from the various parts "of the kingdom where gunpowder is made they can obtain any "quantity of that destructive material, why should they not get "ships? Why should ships alone be contraband—that is to say, "forbidden by the statute?"

The jury could not have misunderstood this. Where my Lord speaks of the building of ships as not being prohibited, he means to refer to the building of ships as distinguished from what might be meant by those other words "equip, &c." As to the second point, I will go to the view presented to the jury about the *Alexandra* and her condition with reference to the 7th section. The reports do not quite agree; there is a slight inaccuracy in a part of a passage which may affect the whole, and I will call attention to it at a proper time. His Lordship, after remarking that he had looked into Webster's "American Dictionary," a work of great learning, research, and ability, said:—

"It appears that to equip is to furnish with arms. In the case "of a ship especially it is to furnish and complete with arms; "that is what is meant by equipping. 'Furnish' is given in "every dictionary as the same thing as 'equip.' To fit out is to "furnish and supply—as to fit out a privateer; and I own that "my opinion is that equip, furnish, fit out, or arm, all mean pre-"cisely the same thing."

There cannot be the slightest doubt that in one sense those four words do mean the same thing—that is, no person could doubt for a moment that to equip would include all equipments, and also that equipment would be a *nomen generale*. Of course, "arm" would be included in the term "equip, &c." Then the learned judge says:—

"I do not mean to say that it is absolutely necessary (and I "think the Attorney-General is right in that)—it is not, perhaps, "necessary that the vessel should be armed at all points."

Now, with regard to that I cannot help thinking that there is a slight inaccuracy in the report, because our report differs from it. The Lord Chief Baron is made to say :—

" I do not mean to say that it is absolutely necessary, and I " think the learned Attorney-General is right in that."

Now, that is one sentence. It goes on :—

" It is not, perhaps, necessary that the vessel should be armed " at all points, although it may be that the case cited from " 6 *Peter's Reports* by the Attorney-General, somewhat late in the " day, is a case where the jury actually found that the vessel was " fitted out."

Now we find immediately afterwards that the learned judge takes distinct note that the *Alexandra* was not armed at all, but still this was a question to be submitted to the jury, notwithstanding that it seems to me perfectly obvious that just a word or two has dropped out from the sentence. It is reasonably clear that he must have said this :—

" I do not mean to say that it is absolutely necessary that she " should be armed, and I think the Attorney-General is right in " that, and it is not necessary that she should be armed at all " points."

Because, otherwise there would have been an end of the case. There would be nothing to go or to leave to the jury if his Lordship had meant to say, " It is not necessary that she should be " armed at all points," implying that it is necessary that she should be armed at all points.

Baron Bramwell.—That would probably not be agreed to by the other side for this reason, that if there was an intention to arm, and they were preparing the ship to receive arms, that would be enough.

Sir Hugh Cairns.—You must bear in mind the statement of the Attorney-General in reply; he had conceded—I may say literally *in verbis*—conceded the question of any intention to arm.

The Attorney-General.—I distinctly differ from my learned friend.

Sir HUGH CAIRNS.—I expect that my learned friend will "distinctly differ" with everything he has heard from beginning to end. I say that the Lord Chief Baron in leaving this question to the jury—"Was there an intention that she should be furnished "or fitted out, or equipped at Liverpool?"—it being admitted that the information did not charge arming, left exactly the question which, under the Act of Parliament, ought to have been left to them. Now, as to the character of the equipment which must be on board, to which throughout the whole of his charge his Lordship must have been taken to have been pointing, your Lordships will find in another part of his charge these words:—

"Now, gentlemen, the question that I shall propose to you is "this, whether you think that this vessel was merely in the course "of building for the purpose of being delivered, in pursuance of a "contract which I own I think was perfectly lawful, or, whether "there was any intention that in the port of Liverpool or any "other English port (and there certainly is no evidence of any "other) the vessel should be equipped, fitted out, and furnished, "or armed, for the purpose of aggression? That is the "question."

Now, my Lords, lower down you will find, after speaking of Captain Inglefield's evidence:—

"In short, what he makes out is that she might have been built "as a vessel capable of being convertible into a war vessel. But "the question is, was there any intention that in the port of Liver-"pool, or in any other port, she should be, in the language of the "Act of Parliament, either equipped, furnished, fitted out, or armed "with the intention of taking part in any contest."

Now, we might have demurred to this proposition, but not so the Crown. If she had not been armed, equipped, furnished, or fitted out with the intention of taking part in any contest *a multo fortiore*, she could not have these things done to her with the intention of being employed in the service of the Confederates, to cruize and commit hostilities against the United States of America. I submit that the charge, looked at in the way that I have

ventured to put it, will in substance be found to have directed the attention of the jury to everything which ought to have been laid before them as a matter of law as well as on the issue of fact to be decided between the parties. I submit with confidence that on the evidence it is utterly impossible to say that a jury was not warranted in coming on the facts to the conclusion that they had done. The evidence for the Crown failed to prove the charge made. If the law is as the Crown allege it to be, I say it is impossible to suppose—carrying in mind the fact that seventy years have passed since the passing of the American Act, and forty years gone since our own was enacted—that cases would not have occurred again and again when seizures and forfeitures would have been made under the penalties of this Act. I say the case they are bringing forward is against the history of legislation on the subject; it is against the true and sound construction of the Municipal Act of Parliament on the subject; it is against the declarations which have been made by every one who had a right to control the movements of the Crown, or to direct or advise the movements of the Crown, in putting this Act into execution from the time the Act first attracted public attention; and I trust that your Lordships will think that the litigation we have had in this case is enough; that full, perfect, and complete justice has been done between the Crown and these claimants on a statute of this kind; and I trust that your Lordships will think that there should be no further litigation in this case.

Mr. Karslake, Q.C., followed, and quoted Fortescue's Reports, p. 338, to show what, in 1713 and 1721, were the opinions and ruling of the judges.

In Michaelmas vacation, 1721, the judges were ordered to attend the House of Lords concerning the building of ships of force for foreigners; and the question the Lords asked the judges was, whether by law his Majesty had a power to prohibit the building of ships of war or of great force for foreigners in any of his Majesty's dominions, and the judges were all of opinion,

except Baron Montague (Chief Justice Pratt delivered the opinion), that the King had no power to prohibit the same, and declared that Montague had said that he had formed no opinion thereon. This question was asked on occasion of ships built and sold to the Czar being complained of by the Minister of Sweden. Trevor and Parker gave the same opinion in 1713.

There (said Mr. Karslake) your Lordships have an opinion given by the judges that the Crown could not interfere to prevent ships of force being fitted out with warlike equipments in this country for foreigners, at all events in the years 1713 and 1721.

He then said—

I want to impress upon the Court that on the part of the person who is the owner or controller for the time being of the vessel, there must be that fixed intention which is mentioned in the case of the "United States *v.* Quincey," and that you must ascertain who is the person who has that fixed intention before you can claim the forfeiture of the vessel. It will be extremely material to bear that in mind, as in this case there are twenty or thirty persons charged with having said this or that about the vessel, the Attorney-General saying, "They were all engaged "together, therefore you must assume the intent to be what we "alleged it to be."

The Crown must lay hands on some particular person in whom they assume the guilty intention existed which has rendered the ship a forfeiture. It is the bounden duty of those who are making out the affirmative to show that at the time when the forfeiture was incurred there were some particular persons who were acting in some way or other against the section of the statute. In order to ascertain the intent or whether it existed, the first inquiry to be made was who was the person who was capable of intending at the time of the forfeiture within the meaning of the authorities. Mr. Karslake then went into the meaning to be attached to the words "equip, furnish, fit out, or "arm." He asked the Court to accept the construction put upon the section by Sir Hugh Cairns. The learned counsel finished his

argument by urging that the direction given by the learned Lord Chief Baron was a right view of the statute; that the verdict was right, and the jury could not have arrived at any other conclusion than they had; and that the verdict for all the reasons that had been brought forward ought not to be disturbed.

Mr. MELLISH, Q.C., followed on the same side. After some introductory observations, he stated that he ventured to go to the extent of saying that it would be perfectly legal under the Act for any shipbuilder to build a ship in this country, well knowing it was adapted for warlike purposes, under a contract with one of two belligerents to equip that ship so far as it was necessary to enable it to sail away from this country, and to deliver it to the belligerent either here or elsewhere in an unarmed state. The building of a vessel was not forbidden by the statute, and that being so, the question was this: Was it the intention of the Legislature, though it did not forbid the building of a ship in express and direct terms, to make it by implication unlawful? Obviously it was impossible to build a ship or sell a ship adapted for war to one of two belligerents, unless they allowed the builder to sell it in such a state as would enable it to sail away. To say to the shipbuilders of this country, "You may sell ships to one of the two belligerents as much as you please, but you must not put anything on board which will enable them to sail away" was a manifest absurdity. If it was the object of the Legislature to prevent any belligerent providing himself with ships from the ports of this country, it seemed extraordinary that they did not in plain terms say, "You shall not be allowed to build a ship for one "of two belligerents, nor sell it to him."

Mr. KEMPLAY then argued upon the construction of the statute, saying that after the very elaborate manner in which all the facts had been gone through by his learned friends it would be unnecessary for him to approach them at all, but he would satisfy himself by making a few remarks upon what appeared to him to be the true construction to be put upon the statute.

The Attorney-General then commenced his arguments and said :—

I will first take the argument of my learned friend, Sir Hugh Cairns, and state to you what I have put down as the different heads of it. First, he says that the probable effect of the statute is to be determined *à priori* by the rules of international law. Usually we approach the question of the construction of a statute by a careful examination of its language and its provisions. If there were a desire to warp the minds of a Court, and withdraw the attention of the judges from the language of the provisions of a statute, I could imagine no better method of conducting the argument than in the first instance to enter into able and ingenuous *à priori* disquisitions as to what may be the probable object of a statute of that description, to refer to some other test than the ordinary one of legal construction, and then go into its history—for that was my learned friend's next point after laying down the probable object. Then, secondly, he says, the history of American and English legislation on the subject confirms this view ; and, when speaking of the history of the legislation, he took a very unusually wide and discursive scope of argument. It is not common in courts of law to hear Parliamentary debates ransacked, and the speeches of this and that statesman, addressed to a deliberative assembly either when a Bill was introduced or under discussion, at other times referred to for the purpose of laying down rules *à priori* as to what were the objects of the statute, and to what rules of interpretation it is to be squared and accommodated ; that, also, was a course and order of argument to my mind strongly indicative of conscious weakness. Then, my learned friend came, thirdly, to the provisions of the statute itself. According to him, the provisions, rightly interpreted, confirm the view which he has advanced. They do not reach any case of a ship built within the realm for whatever purpose, with whatever intent, if her equipments, so far as they are completed, or are meant to be completed, within the realm are *ancipitis usûs*, and not of a distinctive warlike character. Then

his fourth proposition was with reference to authority. He reviewed the authorities in America which he considered to go to the same point, and he referred to the absence of authorities in England as negatively tending the same way. Then he justified the ruling of the Lord Chief Baron, and of course the verdict of the jury. I purpose to meet that argument, and necessarily, in order to do it as I should desire, I must follow the order in which it was presented, though I have already told your Lordships I do not think it the legitimate order in which to examine a question of this description; for I apprehend if, within the four corners of the statute, you get the means of a proper interpretation, you have nothing to do with all those extraneous matters on which my learned friend, Sir Hugh Cairns, endeavoured to base the whole or the main part of his argument. Still, my Lords, as I must not assume that within the four corners of the statute there may not be that which introduces all or some part of those considerations, and as I know I have to deal with an antagonist of the utmost ability, I of course will pay that deference to his argument that is due to it, and I will endeavour to follow it in the order in which it is stated. My friend read from a report of my motions for this rule as follows:—

"It was plain that the object was to preserve the neutrality of "this country, and to enforce it against the subjects of this country "in matters in which the neglect of it by those subjects in the "violation of it here by foreign belligerent Governments was "thought calculated to lead to a position as regards foreign "nations which would endanger the peace and welfare of the "kingdom."

Your Lordships will perceive that I referred then to the preamble, and grounded my view of the language of it upon that which is within the statute itself. My friend's interpretation of this was, in substance, that the object was to enforce the performance of international duties; then he went on to say that therefore international rules would be found to be probably the key to our municipal legislation and to prescribe its limits. Not

only is no such doctrine to be found in this passage of my speech, but it is a doctrine against which I have had occasion most strongly to protest in a speech which I made elsewhere; and though I feel deeply the honour paid to me in referring to anything which has fallen from me elsewhere, yet I cannot help thinking that it would have been better, and somewhat more consonant with the usual way in which cases are discussed, if anything said in a totally different assembly, and for a totally different purpose, by me, whether right or wrong, had not been referred to in this argument; but since it has been said that there was some inconsistency between what I said in March and the duty I am discharging now, I take the liberty to say there was no such inconsistency, and that no one who endeavoured with any degree of care to understand the words which I addressed to that other assembly, feebly spoken as they might be in the defence of the honour and dignity of my country in another place, would see that the whole argument of that speech was to establish the directly contradictory proposition to that of my learned friend on this occasion, and to say that the Foreign Enlistment Act was a mere matter of municipal law; that it was not the exponent and expression of any antecedent international obligations which we owed to any other foreign Government; that a foreign Government had a right to expect from us the enforcement of that Act, but only as a municipal Act, and not upon international principles; and that the same authority which enacted it might, if it thought wise and fit, abolish and repeal it, and that no foreign Government whatever would have a right to complain of it if it did, and that which the Foreign Enlistment Act prohibited was not, according to antecedent rules of international law, a subject of complaint as between Government and Government recognised by established rules, however likely it might be to become a subject of complaint owing to the varying circumstances of politics in different countries. That might be a right or wrong proposition. I shall show your Lordships from authorities that that was a true and correct proposition according to the best American

writers, and according to the decisions in their courts; but certainly that is a proposition diametrically contrary to the fundamental proposition of my learned friend's argument, who says you are to square the interpretation of this statute by what he assumes to have been the obligation of this country to belligerent Powers. I say there was no such obligation, and that it is a total misinterpretation of the municipal law to say that there was any State in the world which, according to the settled and established principles of international law, could have required this country to prohibit those things which were prohibited under that statute. I may be right or wrong in that, but certainly I am not inconsistent. I may say here, in order that I may not be obliged to advert again to a subject to which I advert at all unwillingly, that any one who reads my speech will find that in it, rightly or wrongly, it was stated to be the opinion of the advisers of the Crown that the *Alabama* had offended against this Act of Parliament, and should and would have been detained had she not prematurely escaped; and further, there was a statement of opinion which the speaker at all events entertained, of the conduct of those merchants who made themselves parties to such acts in violation of the law of their own country, calculated, if not to involve the British Government in hostile relations, at least to disturb the amicable intercourse between this country and other Powers. Therefore I am not doing that which I hope no man in my position would do—endeavouring to obtain a verdict of forfeiture against a subject upon grounds of law which were not honestly and sincerely believed to be just and sufficient by the Government bringing forward those grounds. Most fallible those who entertain that opinion may be; your Lordships are the judges of that. We have not been guilty—I have not been guilty, in the position in which I stand, nor was my predecessor, of an act so unworthy of the office we fill, as to bring forward a case of this description, except on grounds which we ourselves believed to be sufficient.

The learned Attorney-General then proposed to go into an examination of the rules of International Law, which had been

used by the other side as a guide to the interpretation of the statute. They had referred to doctrines laid down by different international writers as to the right of subjects of a neutral State to carry on a trade with either one or other of both belligerents. It was said that the interpretation of the statute must be approached with the hypothesis that it was intended not to interfere with that right *primâ facie*. Then it was said there was a rule which provided for the inviolability of the neutral territory by any proximate or immediate act of war on the part of a belligerent, or the subjects of the neutral State instigated by a belligerent. For this the case of the "Twee Gebroeders," in 3rd *Robinson's Admiralty Cases*, had been quoted. That case was an illustration of the settled principles that it would be wrong for two cruisers to engage each other in neutral waters; that it would be equally wrong when an action had been commenced beyond neutral waters to prosecute it by chasing into neutral waters, and equally wrong to lie in wait and commence operations in neutral waters; and that, therefore, that inviolability of the neutral territory from immediate or proximate acts of war was the second principle; and the corollary to be drawn from that was, that certain rules might be laid down as applicable to ships of this kind. Now, continued the Attorney-General, my friend, having referred to those two rules of international law, proceeded to declare from them his own corollary, and in order to do him justice perhaps it might be as well if I refer to his own language. He said, "What would be the conclusion which we naturally should draw from these rules as to the course which municipal legislation might be expected to take?" Then he speaks of the definition of the line outside the dominions of a State, and speaks of the three-mile rule, and then he says, "Then we find that, according to the rules of international law, it is allowable to a neutral State, and to the subjects of a neutral State, to carry and deliver outside that line or inside it any of those articles which are called contraband of war,—guns, ammunition, ships, or any other article which may be supposed. International law also holds that you might bring a ship to the

" outside of that boundary, wherever it is drawn ; that you might " carry from the neutral State guns and ammunition and warlike " supplies of every kind, and deliver them into the ship outside " the boundary, subject to the right of capture ; the other bel- " ligerent, if so disposed and so able, might intercept the supplies, " might capture the ship, and might seize the articles as con- " traband ; but, subject to that, the act might be done without " any offence against the principles of international law. But " then, on the other hand, international law says you must not " originate on the neutral territory any proximate act of war ; " you must not issue out of the neutral territory with a ship " which shall be prepared to commit hostilities."

And then a little afterwards he goes on to say :—

" The belligerent would say to the neutral Power, ' Now we " ' must have an understanding about this. You say that your " ' neutral territory is to be inviolate ; I agree to that. I have " ' no right to go inside your territory and cut out a ship which I " ' see arming and preparing there to commit hostilities. I cannot " ' violate your territory. If I went into one of your harbours to " ' do that you would object to it, and would prevent it, and in an " ' international point of view I could not claim a right to do it.' " But then the belligerent would say, ' You, on your part, must " ' take care that what passes out of your territory shall pass out in " ' such a state as that I shall have a fair chance of capturing or " ' dealing (if I am entitled to capture or to deal with it) with that " ' which comes outside of your territory without its having occupied " ' itself within your territory by preparing itself for aggression " ' upon me ; so that, when it comes out of your territory, it shall " ' not come out as a ship which I have to cope with as a ship of " ' war, but as an article of property which might, if it could " ' escape my watchful care, find its way into the port or the " ' possession of another belligerent, but as to which I, in my " ' turn, have a right to the chance of capturing it and taking it " ' before it could commence hostilities against me.' That would " be a very natural course for a belligerent to take, and very

" natural language for a belligerent to hold; and it is language " the sense and wisdom of which it is impossible to dispute. " Therefore, my Lords, I should say, *à priori*, that what we should " expect to be the course of municipal legislation upon the subject " would be some legislation which would guard against that evil " which I have endeavoured to point out, and which, by way of " restraint upon the subjects of the neutral Power, would prevent " its subjects doing that of which, in the language that I have " endeavoured to convey, the belligerent might complain."

That is all extremely ingenious, but without foundation on the principles of international law. It may be true that the belligerent would complain whenever he was suffering danger or damage from operations of that kind, against which the Foreign Enlistment Act is directed, if they were carried on under the observation of the Government openly in the neutral country. All that fine distinction about the crossing the neutral line is purely imagination of my learned friend's mind, and he wanted to invent a rule of international law to square with the theory of the Act, and at the same time to take off the edge of some practical arguments against his general conclusion. I have a very short answer to make to all this. The American authorities that you will hear of, and other authorities too, all say that, municipal liquidation apart, a ship completely armed and equipped may be sold within the neutral territory, and that the belligerent has no right by any settled rule or principle of international law to complain of it. For the purpose of this distinction, what difference in the world is there between a ship constructed here and a ship sold here? Why, suppose a ship ready-made, made as a mercantile speculation by the builder, that I believe is a case not touched in any way by the Foreign Enlistment Act. Whether it be or not is not the present question. But putting the Act of Parliament and the municipal legislation out of the question, if this rule of international law, which my friend invented in order to make the two things in his argument fit together, existed, it is perfectly plain that no ship ready armed and equipped could be delivered within

the neutral waters, so that she might pass out ready for action if she met the enemy on the sea, without giving a right of reclamation to the foreign Government. Is that the doctrine of American writers? I will refer your Lordships to a short passage in Wheaton's "History of the Law of Nations," New York 1st edition, in which he treats the proposition as one only to be spoken of with contempt. He is there speaking of a controversy between two Italian jurists, Lempradi and Galignani. One of them, Lempradi, he regards as a person of some reputation and learning, while the other is a person of whom he thinks very lightly indeed. I believe we find the very point touched on :—

"Lempradi then proceeds to consider an idle question raised "by Galignani, whether the conventional law of nations, inter- "dicting trade with the enemy in articles contraband of war, "extends to the sale of the same articles within the neutral terri- "tory. Galignani pretends that it does, and that a ship, for "example, built and armed for war in a neutral port cannot be "there lawfully sold to a belligerent. Lempradi takes a great "deal of superfluous pains to fortify, both by reason and an appeal "to the authority of treaties and preceding public jurists, his own "opinion that the transportation to the enemy of contraband "articles of war is prohibited, but that the sale of such articles "within the territory of the neutral country is perfectly lawful."

No one can read that passage without seeing what the author's view of the distinction would be. It can make no difference for the purpose of the distinction whether a ship ready-made is sold, or whether she is manufactured and delivered under an order. So far as that goes, I endorse what the Lord Chief Baron said at the trial, that it could make no difference whether there was a sale of a thing ready-made without a previous contract, or a delivery under a contract. If no legislation made a difference there would be none. The truth is, there is no connection whatever between my learned friend's premises in this part of the case and his conclusion. His two rules of international law are quite sound as far as they go, but they do not conduct you to the conclusion that

there is an obligation antecedently to municipal legislation, upon any neutral country, to prohibit that part of the trade of its subjects which, whatever construction you may put upon this act, is prohibited by the Foreign Enlistment Act.

Now, my Lords, I am about to read you what I heard myself—viz., that it follows that, because a party may sell a vessel which it was said may be sold even unarmed, according to the authority of Story, so he may even execute an order given by one of the belligerent parties for a similar vessel; and then follows this passage :—

"Now, the learned counsel contending addressed themselves "very much to this view of the matter, but it was said, 'But if "'you allow this you repeal the statute.' Gentlemen, I think "nothing of the kind. What that statute meant to provide for "was, I own I think, by no means the protection of the belligerent Power."

With that, my Lords, I fully agree. I think upon the face of the statute it was perfectly plain that it was the peace and welfare of this realm that the statute was made to provide for, and no person can take exception to that.

"I do not think this protection entered into the heads of those "who framed this statute, otherwise they would have said, You "shall not sell gunpowder, you shall not sell guns."

This illustration seems to me to have had the unfortunate effect of representing as it were a complete view of the object of the statute,—that which, to say the least, would be a view only of some incidental inconvenience which the statute might help to meet. His Lordship says :—

"The object of the statute was this :—We will not have our "ports in this country subject to possibly hostile movements; "you shall not be fitting up at one dock a vessel equipped and "ready, not being completely armed, but ready to go to sea, and "at another dock close by be fitting up another vessel, and equip-"ping it in the same way, which might come into hostile commu-"nication immediately, possibly before they left the port. It

"would be very wrong if they did so, but it is a possibility. Now "and then it has happened, and that has been the occasion of this "statute."

The Lord Chief Baron.—There is an error there, because it is quite plain from the summing up that that was not the occasion of the statute. It was one of the occasions that might give rise to it.

The Attorney-General.—No doubt, my Lord, whatever about your intention, but no one could read the passage without being satisfied that your Lordship thought the only object of the statute was to prevent within British waters those acts which may be called direct, or, as my friends call them, proximate acts of hostility. The whole tendency of the passage was to mislead, leading to this, that there was no reason why ships should not be in a different position from other contraband. The preamble speaks of the enlistment or engagement of His Majesty's subjects to "serve in war," and of the equipping and fitting out and arming of vessels "for warlike operations in or against the dominions or territories of any foreign prince," or "against the ships, goods, or merchandise of any foreign prince, or his subjects," as prejudicial to and tending to endanger the peace of the kingdom. The statute follows out that preamble in the second section, prohibiting the enlistment, &c., "of any natural-born subject of the Crown." When we take the subject of enlistment we find that there are no proximate acts of war within or without the territory aimed at; on the contrary, it deals with the enlistment of natural-born subjects anywhere. Now, upon the equipment of vessels I say that, upon the face of the preamble and clauses taken together, a mischief as large as words can describe is pointed at as not sufficiently prevented by existing laws—namely, a danger to the peace and welfare of this kingdom, and there is a danger which is supposed may arise from acts of the subjects of the British Crown beyond British territory.

The Attorney-General then quoted "Bynkers-

chocck," cap. 9, on the question of contraband; also the Queen's proclamation of May, 1861; and then, in speaking of the difference between ships and ordinary contraband, says:—

Let me apply a test which one has seen frequently suggested as to whether an adventure is a commercial or a warlike one—that an act of this description is directed against warlike and not against mercantile adventurers. A man who carries them across the seas hoping to run a blockade, or to deliver into the belligerent country, being a neutral, is obviously engaged in merely a commercial adventure. It does not become a warlike operation until, as expressed in a speech of Mr. Canning's, the elements of armament are combined in the country at which she is intended to arrive. But this ship is quite a different thing. The elements of armament are combined in her whether she is on the high seas or in a neutral country, as the case may be, and she is herself when she takes the water, to a very great extent, a contraband made up, a combination made up, as Lord Stowell expressed it—a combination of elements of armament. But there is another thing which makes the one adventure commercial. The person who is concerned, the neutral carrier, is trading with his own goods for his own profit, and till he delivers them to the market to which they are about being taken, there is no person concerned in that transaction, except a person whose purpose can be commercial only. But if the foreign Government, by its agents, order ships of war to be constructed in a neutral country, and turn private dockyards of neutral merchants, in a neutral country, into its own dockyards, it is clear that its adventure is warlike from the first. That Government is the principal in the transaction. It causes these ships to be made and equipped, and for it they are built and equipped, and it has no purpose or object whatever of a commercial kind. It is purely and simply a warlike operation on the part of that Government—viz., to acquire and launch from that point of departure ships to be used as instruments of war.

The Attorney-General then entered into the question of the destination of a ship, and quoted cases in support of his argument, and then said:—

Now, upon the question of construction I need not remind you of the principles with which you are so familiar. When you have words which, according to a sound construction, may prevent the mischief and advance the remedy they should be so construed. There is an American case on this subject, "The United States *v.* Workman and Carr" (Horton's "American Criminal Law"), a case on the enlistment clauses of their Act, and not the equipment clause. The indictment, singularly enough, contained ninety-seven counts, setting forth the various offences supposed to have been committed against the Act. The Attorney-General read this case, which seemed to go on all-fours with the cases already cited, and the Attorney-General then said that it would be new to him if the Court gave countenance to the notion that the construction of an Act of Parliament was to be limited or cut down by any previous declarations or speeches of statesmen or member of Parliament, whether at the time of introducing it or at any other time.

The Attorney-General then referred to the "rules" of Washington, and said:—

I do not mean to argue whether or not arming and equipping are to go together there, but at all events "the original arming "and equipping of vessels in the ports of the United States by "any of the belligerent parties for military service, offensive or "defensive, is deemed unlawful." That is the first rule. Then the next rule permits the equipment of merchant vessels; that is lawful. The third rule, I think, clearly speaks of the equipment of vessels already in existence, and in the service of the Government; not vessels to be brought into existence by operations within the United States, but vessels existing already in the immediate service of the Government. "Equipments in the ports

"of the United States of vessels of war in the immediate service "of the Government of any of the belligerent parties, which if "done to other vessels would be of a doubtful nature, as being "applicable either to commerce or war, are deemed lawful," which, in fact, is merely the ordinary hospitality shown by all countries in the world to all ships of war (which I will observe upon when I come to the 8th section of the Act of Parliament), with an exception with regard to prizes taken from France, founded on the treaty obligations towards France. Then the fourth rule is this:—"Equipments in the ports of the United States by any of "the parties at war with France of vessels fitted for merchandise "and war, whether with or without commissions which are "doubtful in their nature, as being applicable either to commerce "or war, are deemed lawful, except those which shall be made "prize."

The Attorney-General then entered into an examination of the statute connecting it with the American Act.

Referring specially to the 7th section, he noticed the difference (chiefly grammatical) between it and its American parallel, the 3rd section of the American Act. He then referred to the 11th section of the American Act, which says:—

"That the collectors of the Customs be, and they are hereby "respectively authorized and required to detain any vessel mani- "festly built for warlike purposes, and about to depart," under certain circumstances. Now, that is important, because it shows most distinctly that a vessel which is not provided with equipments exclusively applicable to war, provided she be manifestly built for warlike purposes—a vessel which, though not armed, has a cargo consisting of arms and ammunition—is within the purview of the Act, and is to be detained until certain security is given. That provision is not in our Act either. I do not myself think

that it much affects the question one way or the other; but as far as its bearing goes upon the construction of the American Act, I do not think that it is that which my learned friend has attributed to it.

The Attorney-General then proceeded to comment on the words "equip," "furnish," "fit out," and "arm," asserting that they had each a sense sufficiently different from the other to explain why the Legislature had considered it expedient to put every one of them under the disjunctive. On the term "fitting out," he said:—

If the case required it, I should not shrink from saying that, provided you had got the necessary evidence of intent, which, under those circumstances, of course, would not be easy or obvious, every single act done, as has been said, from laying the first plank for the keel to the completion of the vessel in a state fit to go to sea, is legitimately covered by the words "fit out." If the whole thing done is for a particular purpose, as one act, I say that every single part of it is only a step in progress to complete the whole. I say that the words "fit out" comprehend every single act connected with the operation tending to that result, from the laying down of the keel to the end. Supposing that I come into court, having seized a vessel in the very earliest stage of its progress, when it was a mere hull, certain planks put together, but with evidence of an indubitable character that that was done under a contract which is produced and proved to the Court, that the persons doing it would build and completely equip and arm that ship (or I may omit, and will omit, the word "arm") for a particular service—namely, that she should be employed in the service of the United States, the Confederate States, or any other such belligerent Government, to cruise and commit hostilities, every single step *ab initio* would be a step towards the completion of

that design. I believe that I should be perfectly warranted in that view.

The Attorney-General then came to the charge of the Chief Baron, with the object of showing that the actual tendency of what had fallen from the Court, if his argument on the law were carried, was to mislead the jury on the subject of the law, and said :—

Now, my Lords, I have concluded all the observations which I have to offer to your Lordships upon this case. I cannot but think that your Lordships will deal in a way that will be satisfactory to the Crown and the public with this case. We are not in an atmosphere where any argument of prejudice, either one way or the other, can prevail. The matter has been fully considered, and I have not the slightest doubt that your Lordships' judgment in this case, in the way in which you will deal with it, will be entitled to and will receive from those who will have to comment on it hereafter the same respect which has been justly paid to the long series of the decisions of the American Courts on a similar Act of theirs —I must say decisions most honourable to the country and to the tribunals from which they have proceeded, because that Act was passed, as your Lordships are aware, under circumstances of peculiar difficulty, when the irritation and the animosity resulting from the War of Independence had not passed away, when the recent allegations of the United States to France were fresh in their memory, when the sympathies of the whole country ran breast high with the revolutionary party in France, and against the Powers of Europe who were opposed to the war in that revolution of party. Under these circumstances it was that Washington caused to be introduced that Act, and in every single trial that has ever taken place under it, the judges of the United States have manifested a lofty and most upright determination to give full and fair effect to it, not straining it either in the direction of popular bias or prejudice or of mercantile interest, and, on the other hand, not straining it in favour of the Crown or the Commonwealth against

the subject. We do not wish it to be strained in favour of the Crown against the subject, but we do desire that it shall be established by your Lordships' judgment that those great and most important objects, to promote which the Act was passed, will be proved to have been effectually accomplished by that Act, and that that great and most serious mischief which the Act points out as the mischief which it was intended to remedy, may be effectually repressed by the construction which, from your Lordships, that Act shall righteously receive, and that the whole matter may not turn out to have been entirely misunderstood by the Legislature which was engaged upon it, and a futile instrument, not capable of being successfully applied, placed in the hands of the Crown.

The Solicitor-General, Mr. Collier, then followed, and after a long argument on territorial sovereignty, said :—

Before I come to the question of the actual construction of the Act I would observe that though, no doubt, vessels of war are contraband in the same sense as arms and ammunitions are, yet considerations apply to ships which do not apply to arms and ammunition. A ship is not merely an engine of war, but she carries engines of war ; a vessel carries men to work those engines. A vessel is a nationality, a vessel is territory for some purposes, and it is inhabited territory ; so that a vessel armed, equipped, and manned is, in fact, a floating hostile territory, and a vessel not equipped or manned still has capacities for the accommodation of armaments, to use an expression of Canning's, which is totally inapplicable to arms and ammunition ; and therefore there appears to be some reason why the Legislature should have thought it desirable by enactments to deal with vessels without dealing with other articles of contraband of war.

Then reverting to the 7th section, he said, that from it two questions arose :—

The first in order which I shall take is the intent ; and, secondly

what is to be done in pursuance of that intent. Now, first, with respect to the intent—who may form the intent? No doubt, the intent must be formed by somebody who has some control over the vessel. There may be two descriptions of intent, both within the meaning of this statute. The first description would be the intent of a foreign belligerent or his agent to employ a vessel to cruize and commit hostilities. The second intent would be that of a person who equipped her in order that she might be so employed—and I cannot help thinking that the words "in order that" were introduced to meet that second intent, for it might be said, by way of what I should venture to call a quibble, the equipper may not intend that she shall be employed, because he has no control over her after she leaves his hands. I dare say, as a matter of history, an argument of that sort was put forward, and then the Legislature said, for the purpose of meeting that, we will put in the words "in order that." That, I think, is the probable explanation of the words "in order that" being inserted. Now, with respect to the first class of intention to which I was referring—namely, the intention of a belligerent or his agent to employ the vessel hostilely: if he procures her to be equipped, even although the equipper does not know of the intention, I apprehend there can be no question at all that that would forfeit the vessel; it would not be necessary to contend that in this case, but I apprehend it would be so according to the strict construction of the Act. The object is prevention; the object is the prevention, if possible, of any vessel issuing out of this country as the basis of hostilities, and I apprehend that that would be the true construction, and that the vessel would be forfeited independently of any intention at all of the equipper, the intention being in the person ordering the vessel and having control over its ultimate destination to employ her in hostile operations; and if that be so, for a moment adverting to the evidence, there can be, I think, no question that this vessel would have been forfeited upon that ground here. However, this is rather anticipating. Then, secondly, with respect to the equipper, I apprehend that if the equipper equips the vessel knowing that

she is to be so employed, then he is within the Act; he equips with the intent, or in order that, or at all events he aids, or at all events he knowingly aids and assists, and he clearly would come within the Act. With respect to the intent, I do not think there will be any difficulty in this case. When I come to the evidence I think I shall make that quite clear. It is very seldom, in fact, that you can prove intent so clearly as you can here. Now I come to this, what is to be done in pursuance of that intent? The words are these, and we seek to add nothing to the words, and on the other hand we desire nothing to be abstracted:—

"If any person shall equip, furnish, fit out, or arm any ship or "vessel with intent or in order that such ship or vessel shall be "employed in the service of any foreign Prince, State, &c., or with "intent to cruise, or to commit hostilities." The word "intent" is unnecessary I should think. What is the meaning of that? I could quite understand this proposition. It would be a very definite and intelligible one. She must be equipped so far as to be in a condition when she leaves the port to commit hostilities. That I could understand would mean that she must be armed, because she could not be in a condition to commit hostilities without being armed, and, more, it must mean that she must be manned, because the guns cannot be used of themselves. So, therefore, in order to contend that she must be in a condition to commit hostilities you must go the length of saying that she must be both armed and manned. But that is against the words of the statute; that is reading the conjunctive instead of the disjunctive, and the very object of the Legislature is defeated, as it appears to me, who intentionally avoided the conjunctive and used the disjunctive.

The Solicitor-General then came to the question of equipment, and argued that all equipment must be judged to be warlike by the intent proved warlike; that, in fact, the intent defines the equipment. He then dwelt upon the charge, and took much the same

exception to it that had been taken by the Attorney-General, and concluded in these words :—

On these grounds, therefore, I submit to your Lordships that the verdict was against evidence, and I will not fatigue you with any further observations. I do submit, and with confidence, that this case has not been satisfactorily tried. It is, no doubt, the first occasion upon which a statute of very great importance, of considerable difficulty in the construction, has been presented to a jury ; it is, therefore, not unlikely that there may have been some misapprehension and some miscarriage as to the construction to be given to the Act. I submit to your Lordships that, as in the interests of the Crown and the interests of this country, which are one, the whole of the population of the kingdom have a deep interest in having the law settled, in having the law vindicated, there should be a new trial.

In the course of the argument (and we have put it in thus in order to avoid a lengthened discussion), the Lord Chief Baron said that he would call attention to the exceptions that were taken by the Crown, the first of which was handed up to him as soon as the case was over :—

" 1. That if the vessel was in a course of building, for the pur-
" pose of being delivered in execution of a contract to build, the
" statute was not violated.

" 2. That if the vessel was not intended to be finished, equipped,
" furnished, or fitted with a warlike armament at Liverpool, no
" violation.

" 3. The direction that it is immaterial that they knew that the
" vessel should be employed by a foreign Government against a
" friendly State."

The exception was then amended, and presented in the following form :—

" That if the vessel was in course of building in execution of a
" contract with or orders from the Confederate States, or their
" agents at Liverpool, for the purpose of being employed by the

"Confederate States to commit hostilities against the United "States, the statute was not violated.

"That if the vessel was not intended to be equipped, furnished, "or fitted with a warlike armament within the realm, the statute "was not violated.

"That it is immaterial that the persons engaged in executing "such contract or order knew that the vessel was to be employed "by the Confederate States against the United States.

"That, in the 7th section of the Act, 'equip,' 'furnish,' and 'fit "'out and arm' all mean the same thing."

The Queen's Advocate then followed, and, after a few opening remarks, said :—

Although your Lordships are familiar with the rules which govern the construction of statutes, still I must refer you to the expressions of the late Lord Chief Justice Tindal in the case of the Sussex Peerage. I think that nowhere is there found laid down with greater precision and accuracy the rule which ought to govern an English statute. The construction was upon the Royal Marriage Act, and his Lordship says :—

"The only rule for the construction of Acts of Parliament is "that they should be construed according to the intent of the "Parliament which passed the Act. If the words of the statute "are in themselves precise and unambiguous, then no more can be "necessary than to expound those words in their natural and "ordinary sense. The words themselves alone do in such cases best "declare the intention of the law given. But if any doubt arises "from the terms employed by the Legislature, it has always been "held a safe means of collecting the intention to call in aid the "ground and cause of making the statute, and to have recourse to "the preamble, which, according to Chief Justice Dyer, is a key "to open the minds of the makers of the Act and the mischiefs "which they intended to redress."

The learned QUEEN'S ADVOCATE then went into an analysis of Sir Hugh Cairns's argument upon the construction of the statute :

and as the same thing had been done by the Attorney and Solicitor General, we must necessarily pass over the greater part of it. The Queen's Advocate said that Mr. Mellish argued that the object of the statute was to prevent an insult to this country, and added that international legislation waits, like municipal legislation does, till the mischief has happened. There he joined issue with Mr. Mellish. It was a forgetfulness of the great peculiarity of the statute which ran through the whole of the argument on the other side. The statute was a preventive one, and, so far from waiting till the mischief had happened, it, by a machinery entirely its own, directed partly against the individual whom it divides into two classes, the principal actor and the subordinate actor, and partly against the instrument of the individual, the ship itself, endeavours to prevent the evil from being committed, and it gave the Crown the immense power of seizing the vessel as *ipso facto* forfeited by the particular act of either of these individuals.

The LORD CHIEF BARON. — It should be observed that a considerable part of the enactment is unnecessary. For instance, when it is pronounced to be a misdemeanour to do a certain act, by the common law if a matter is created a misdemeanour it is a misdemeanour to attempt to do it, to begin to do it, or to aid or assist in doing it. That part of the statute with respect to aiding, assisting, endeavouring, and so on, was not necessary, but it was necessary to put those words in in order to create the forfeiture.

The QUEEN'S ADVOCATE said that he was not going to entertain their Lordships, as had been done by the other side, with extracts from Mr. Canning's speeches and from those of other members of Parliament who took part in the debates upon the Foreign Enlistment Act.

The LORD CHIEF BARON.—I own that it strikes me that speeches in Parliament and historical statements by a very eminent historian—Alison's History, for instance,—and some of those other matters it is difficult to stop in an argument to set out which a defendant in a case may think necessary to state, but that

mode of dealing with a legal question should be administered with a very sparing hand.

Now, my Lords, I think that I am entitled, although they do occur in a Parliamentary form, to read to your Lordships the expressions of the Judge of the High Court of Admiralty when he sat in Parliament, and when he was no less a man than my Lord Stowell, because what he said was on rising in his place as the Judge of the High Court of Admiralty, and holding a neutral position :—

"There could be no solecism more injurious to itself or more "mischievous in its consequences than to argue that the subjects "of the State had a right to act amicably or hostilely with refer- "ence to other countries without the interposition of the State "itself. It was hardly necessary to press these considerations, "because all the arguments which he had heard upon the subject "had fully admitted that it was the right of States, and of States "only, to determine whether they would continue neutral or "whether they would assume a belligerent attitude ; that they "had the power of preventing their subjects from being belligerent "if they agreed to it."

There is also language which I would, without mentioning where it comes from, make part of my speech :—

"When ships were employed in the service of any Power what- "soever without a licence from the British Government, such an "enactment as this was required by every principle of justice ; for "when the State says, 'We will have nothing to do with the "'war waged between two separate Powers,' and the subjects in "opposition to that say, 'We will, however, interfere in it,' surely "the House would see the necessity of enacting some penal statute "to prevent them from doing so, unless, indeed, it was to be "contended that the State, and the subjects who composed that "State, might take distinct and opposite sides in the quarrel."

Now, my Lords, these arguments and these citations I really do think have a direct bearing upon this part of the case, because they go in aid of my proposition that the real object of this statute

was to enable the Crown to observe not a nominal, but a real and practical neutrality in these cases; it was to place the Crown in a position in which it might have an answer to foreign States when they said, "Out of your harbours come all these privateers, and "all these armies of men come out of your country." It was to enable the Crown not to punish, but to prevent such proceeding taking place, and thereby, in plain English, to enable this country to remain at peace.

After dwelling much on the meaning to be placed on the word equipment, he referred to several books for that purpose, and, amongst others, to Burn's "Naval and Military Technical Dictionary of the French Language." Under the title of *équipment* is there given armament, manning, accoutrements, stores for the voyage; and under the title *équipper* is given to equip, fit out, arm, provide and furnish, provide with necessaries or stores, supply stock, &c.

The learned Queen's Advocate then remarked upon the evidence, and cited some authorities, from which he read extracts, and concluded his argument by saying that, for all the reasons which had been urged upon the Court, the verdict must be deemed unsatisfactory, and the rule for a new trial ought to be made absolute.

Mr. Locke and Mr. T. Jones then followed on the same side, in great measure reiterating the arguments of their colleagues.

The Court took time to consider judgment.

CHAPTER VII.

REMARKS ON THE ARGUMENTS FOR AND AGAINST THE NEW TRIAL.

THE splendid array of talent engaged on both sides in this case promised that on the hearing before the full Bench a display of oratory, peculiarly rich in rhetorical and legal ability, would result. And none can have been disappointed on that ground at what took place. The mere fact that the attack was made upon the strength of a statute of nearly fifty years' standing, but under which no conviction had as yet been effected, was sufficient to stimulate the defenders to mighty efforts on behalf of their clients. The knowledge also that this case and the judgment in it would form a precedent by which future judges would be guided, added increased importance to his charge in the eyes of Sir H. Cairns. And to these matters I feel sure may be added the fact that that learned counsel completely believed in the right of a neutral subject to sell ships alike to both belligerents. His speech on the trial and his argument in the Exchequer Court show his confident dependence on that reading of the law. Well might he confess in opening to the difficulties he incurred in encountering

arguments from the other side of the nature of which he was then uninformed. Other than he might well have shrunk from such a challenge, supported as the prosecution was by such talent as is possessed by Sir R. Palmer, Mr. Collier, and the Queen's Advocate. But Sir Hugh was quite equal to the occasion, and divested of much of their importance the past and possibly future arguments of the prosecution. He supported by copious references to English and American precedent, and by quotations from the Parliamentary speeches of the actual framers of the Act, his view of the construction to be placed upon that Act, and of the nature of the intent aimed at therein, as also of what equipment was really prohibited, and what was allowed. The "Keel" argument of the Attorney-General he completely demolished, as also the assertion of that learned gentleman that it had never entered into the minds of judges or writers on international law to provide for the possibility of the ships of two belligerents fitting in our ports, and commencing hostilities before quitting our jurisdiction. The prosecution, in spite of their advantageous position, did not much advance their case by the fresh argument they introduced. The speech of the Attorney-General was undoubtedly a brilliant effort, and supported as it was by the talents of the Solicitor-General and the Queen's Advocate, lent an apparent superiority of weight to

the side of the prosecution. But that superiority was more apparent than real. There must have lurked in the mind of the Attorney-General the knowledge that he was engaged in the most unpopular of prosecutions. With his case backed up by witnesses many and the most important of whom were utterly incredible, having withdrawn the question of armament from his counts, and depending indeed for the reversal of the verdict upon purely technical points, he found fault with Sir H. Cairns for embarking on the history of the statute, and for referring at such length to the speeches of those in Parliament who had assisted at the framing and passing of the Act, though compelled to admit that "there was that within the four corners of the statute "which embodies all or some part of these considera-"tions." But the Queen's Advocate in his argument rather supported the views of Sir Hugh than those of the Attorney-General on this point of reference to the history of the Act and the language of its framers, for he quoted Chief Justice Tindal as saying, "that "in cases where any doubt arises from the terms "employed by the Legislature it has always been held "a safe means of collecting the intention to call in aid "the ground and cause of making the statute," and this obviously could not be done without reference to its history. The Attorney-General also in the discussion that ensued prior to the hearing for a new

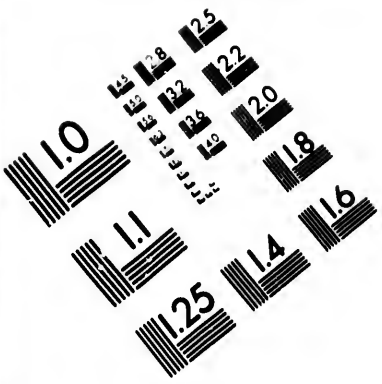
trial was very strong against the Chief Baron for having asserted that in his opinion the terms equip, fit out, furnish, or arm were all of one meaning, and were indeed a specimen of the verbiage which is generally to be found in Acts of Parliament. It will be remembered that the Chief Baron supported his opinion by a reference to Webster's Dictionary, where he found, he said, that to equip meant to furnish with arms, and that furnishing was given in other dictionaries as the same thing as equipping. The Queen's Advocate supported this very definition by a reference to Burn's "Naval and Military Technical Dictionary of the French Language," where he found under the title of *équipment*,—armament, manning, accoutrements, stores for the voyage; and under the title of *équipper*,—to equip, fit out, arm, provide, and furnish. Thus in two very important points we find the prosecution in the person of the Queen's Advocate differing from the Attorney-General, the leading prosecutor, and supporting statements and the mode of procedure of the Lord Chief Baron and Sir H. Cairns.

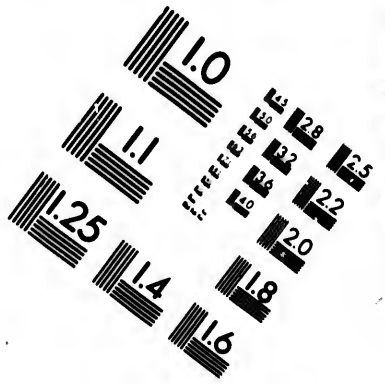
The prosecution were also very strong against the defendants in asserting that they, for the sake of private gains, incurred the risk of putting the Government in difficulties with a foreign State. But does not such accusation apply with equal force to those in Birmingham and other places who have made

large sums by the sale of guns, rifles, and munitions of war? Does it not apply with even greater force to those mail companies who have allowed their vessels to be the means of carrying such supplies of contraband into the very ports of the Fede

But are such animadversions at all meri[illegible] different branches of our trade called in [illegible]? Does any man in the country, who in the ordinary course of his trade and avocation sells to either belligerent that will buy, instruments of destruction, be they ships or muskets, necessarily deserve such accusation? How did Mr. Huskisson speak of such trade and the attempts to stop it but by saying, "Of "what use is our skill in *building* ships and in making "munitions of war, if to *sell* them to *either belligerent* "is a violation of neutrality?" And if for the first time in the history of England or America it is forbidden to *sell* ships to belligerents, then in all fairness the prohibition must be extended to arms, and indeed to any material of war justly described as contraband; and then who could fail to see the endless restrictions and annoyances to our trade that would inevitably ensue, and which would, as has been before remarked, render our position as neutrals nearly as harassing and unprofitable as when actually belligerents?

I think, on review of the arguments of the Attorney-General, it must be admitted that the learned





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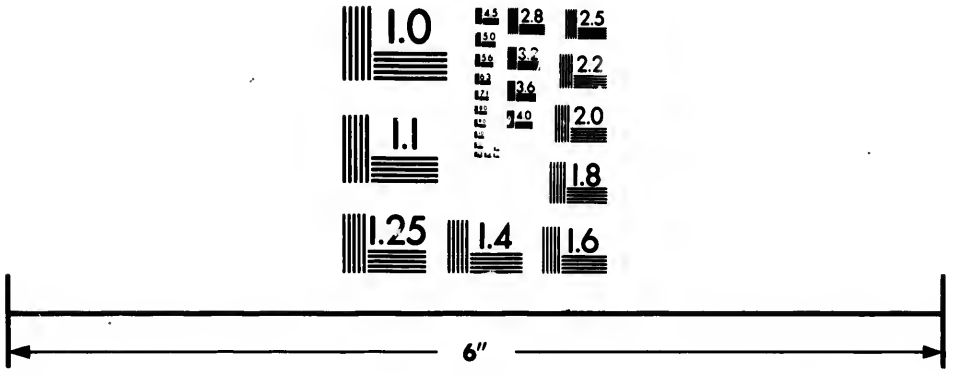

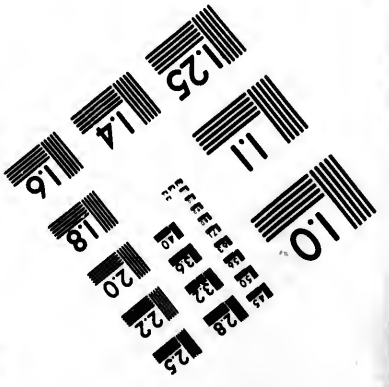

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gentleman attempted to prove too much. Knowing well the difficulties against which he had to contend in proceeding upon what at the best is a very doubtful statute, with a verdict against him unanimous and immediate, and with a most unpopular cause in hand, he sought to fortify his position by asserting that not only was the *Alexandra* an infringement of the Act, but that even had the mere keel of a ship been laid down which might or might not be suitable to a ship of war, that very keel could under the Act be seized and forfeited, though the 7th section, on which he prosecutes, distinctly says that "any person "equipping or attempting to equip *any vessel* is guilty "of misdemeanour;" thus, as Sir H. Cairns puts it, clearly presuming the existence of a ship to be equipped. And in all precedents bearing on this case there were most certainly vessels in existence prior to the offence of equipment which was alleged against them. There is, moreover, no case in English or American courts where the building of a vessel is called in question, and no case where the selling of a ship has been pronounced illegal or calling for the forfeiture of such ship and its tackle.

Again, I think it was evident that the prosecution, in depending so much on the fittings of the *Alexandra*, such as hammock-nettings, strong bulwarks, and ports, attempted to override that important rule of Washington's, which was that "all fittings of a

"doubtful nature, *ancipitis usus*, such as could be "applied to either commerce or war, were lawful." Our merchant vessels frequently carry a couple of guns, hammock-nettings, &c. And therefore these things, even if satisfactorily proved to exist, did not constitute conclusive proof of warlike equipment, and therefore of hostile intent.

In concluding the remarks on the trial, I particularly beg the attention of readers to the chapter on "Precedents," in which I think it will be seen that every important case in the courts of America bears out the reasoning and arguments of the Lord Chief Baron and Sir H. Cairns, and consequently renders most arbitrary and excessive the restrictions that the arguments of the prosecution, if acted upon, would effect against the trade and position of a large and important branch of the subjects of the Crown.

CHAPTER VIII.

THE JUDGMENT OF THE FULL COURT.

PONDEROUS as were the arguments of Judge and Counsel on the trial, and at the hearing before the full court, those of the learned Barons in their final decision were even more weighty and of more conspicuous lucidity than those formerly delivered. It seems to be acknowledged that the present is a case in which information of a decided nature on certain points of law has been the result of procrastinating judgment; but that we have at length obtained that sound and definite opinion which, though it does not represent the unanimous dicta of the four Judges of the Exchequer Court, at least puts us in possession of every phase of the action described as illegal by the prosecution, and of the statute on which they proceeded. We have now the deliberate and matured opinion of the impartial judge, where we had previously but the warm and partially interested arguments of the advocate. These opinions are however given at such length as to be altogether beyond the limits of a pamphlet; and I can therefore but make a few scanty comments thereon. It will be seen that the Chief Baron, in

deciding against the rule for a new trial, abated no tittle of what he had previously advanced and laid down. Far from weakening what he had formerly asserted as his belief of what was the law under the statute, by any retractation or modification of what he had then said, he rather strengthened his past arguments by the importation of fresh doctrines in their defence. He reiterated his opinion that, "provided "a ship leave this country in no condition to commit "hostilities, though she may be of a warlike charac- "ter, there is no violation of the Act." He declaimed afresh against "a loose or elastic interpretation of a "criminal statute, to serve a special but a temporary "purpose;" and denounced the appeal made by the Attorney-General to the Court, on the ground of consequences that might ensue upon a verdict of acquittal, "as doctrines which ought not to have "been presented at all;" and added that "he was "inclined to doubt the soundness of any proposition "that required such a style of argument for its sup- "port, and that international law would be of little use "if it did not govern the conduct of strong nations as "well as weak ones." He pronounced with confidence that it is lawful to build ships of war, and that "the "object of the statute was not to prevent the building "of ships by British shipbuilders for one of two bel- "ligerents; but to preserve the ports of the country "from being made ports of *hostile equipment* against

"a friendly belligerent, but not in any way to fetter "the commerce of this country, or the trade of ship- "building, beyond what was necessary for that pur- "pose." He then reverted to the fact that it was positively allowed by the Act to refit, as to naval purposes, an armed belligerent ship of war that has suffered from stress of weather, or damage by the sea in any way; and asked whether, according to the theory of the prosecutor, that would not render the shipbuilders performing such refitting, liable for attempting to equip, fit out, and furnish a belligerent ship of war? His Lordship then referred to the judgment of Mr. Justice Thomson, in the case of Quincey, in the Supreme Court of the United States; and argued that, "whilst it gave American citizens a "right to send armed vessels out of their ports, it aimed "at preventing the citizens *themselves* from committing "hostilities against foreign Powers at peace with the United States; but left them at liberty to sell the vessel to one of the belligerents." And from the remark accompanying that judgment, that "all the latitude "necessary for commercial purposes is given to our "citizens, and they are restrained only from such "acts as are calculated to involve the country in "war," drew the deduction that "the citizens of the "United States have a right to build what ships they "please, and dispose of them as they please, provided "they do not *themselves* take part in the war, and the

"ships are not employed *by them* to commit hostili-
"ties."

"And what pretence is there," said his Lordship, "for giving to the English Act with respect to ship-
"building a construction totally different from that "which the Act of Congress bears, according to the "judgment of the American judges themselves, in "their Supreme Court?" His Lordship concluded in these words:—

"I cannot believe that the sound construction "of an Act of Parliament, passed within fifty years "of the present time, can by possibility lead to such "an amount of inconsistency and absurdity, and I "may add injustice, as is involved in the construc-
"tion we are asked, with so much earnestness, to "put upon this statute. It seems to me to amount "almost to that degree of what is repugnant to "common sense as ought, according to the golden "rule, to defeat the effect, even if words conveyed "the meaning, which they do not. With respect to "the rule, I am of opinion that none of the grounds "on which it was moved ought to prevail, and that "the rule ought to be discharged."

Mr. Baron Bramwell next delivered judgment, and in arguments equally lucid and weighty, and in all respects agreeing with those of the Chief Baron, wound up a lengthy but most valuable disquisition on all the legal points involved, by stating "that, in

"his opinion, the direction of the Lord Chief Baron "was substantially, if not verbally, correct. Still, "in considering whether the jury had come to a "wrong conclusion, whether the verdict was against "evidence or otherwise unsatisfactory, all that his "Lordship had said must be taken into considera- "tion. And though the proceeding is penal, if there "had been any evidence on which the jury could "have acted, I should have thought there ought to be "a new trial, considering that the defendant kept "witnesses out of the box who must have known "the whole truth. But, interpreting the statute as "I do, I think the verdict was right. I have no "doubt the vessel was building and equipping for "the Confederates in order that they might use her, "when armed and equipped, for hostilities against "the Federals. This was being attempted; but I "see no evidence that it was intended to arm or "equip her in the Queen's dominions, so as to be "capable of attack or defence. On the contrary, I "believe it was intended to evade, not to infringe "the statute; not to commit a misdemeanour, nor "to do or attempt to do what would cause a forfei- "ture of the ship. I believe, on the evidence, that "it was intended to deal with this vessel as with the "*Alabama*—get her out of the country, and give "her armament and warlike equipment out of the "Queen's dominions. It is worthy of remark that

"the information does not suggest it was intended "to arm her here. I think, therefore, that this other "ground for a new trial fails, and that the direction "was right; and that, on a right direction, the ver- "dict for the defendant was right on the evidence. "Consequently, I am of opinion that the rule must "be discharged."

Mr. Baron Channell followed, and in a judgment as remarkable as that of his two brothers for its clearness and strength of argument, whilst agreeing in many respects with them, came to a different conclusion as to the propriety of yielding or refusing the demand for a new trial. In so doing, however, he found it needful to disagree entirely with the Attorney-General in his assertions as to the "fitting" of a ship including its building; and thus supporting Sir Hugh Cairns against the prosecution on that question of the "keel argument." After expressing his objection to the form of the questions left to the jury by the Lord Chief Baron, he proceeded to say that "he did not find in the summing-up of that "learned judge, under circumstances of great diffi- "culty, any statement of law which in his judgment "was absolutely erroneous; but that he should, on "the ground of misdirection, including in that, in- "adequate direction and expressions calculated to "mislead the jury, pronounce for the new trial."

Mr. Baron Pigott then gave his decision in a judg-

ment as elaborate though not so lengthy as those preceding. He arrived at the same conclusion as Mr. Baron Channell, though for different reasons. In the course of his remarks he found occasion to quote Falconer's Marine Dictionary on the term "equip," which he said gave for the meaning "a "term frequently applied to the business of fitting a "ship for sea, or arming her for war," thus ratifying by a further reference the opinion of the Lord Chief Baron, that "equip," "fit out," "furnish," and "arm" meant all the same thing, and were, indeed, but the verbiage too frequently found in Acts of Parliament. To this it will be remembered the Attorney-General demurred. In conclusion, his Lordship said, that though the Lord Chief Baron had left to the jury the question of equipping, fitting out, and furnishing, in the alternative, yet in his opinion there were other passages in the summing-up which were inconsistent, and had a tendency to mislead, and on those grounds he should give his opinion in favour of a new trial.

There were thus two judges in favour of and two against a new trial. This amounted to a dropping of the rule; but, as is usual in such cases, the junior judge withdrew his judgment, and hence a judgment in favour of the defendants.

The Crown has the right of appeal, of which most probably it will avail itself.

Unsatisfactory as is the result (in some respects) to all interested, yet there are to those who deem the prosecution of this ship unjust from the first, some items of consolation. It is at least some ground of satisfaction that the two senior judges are against a new trial; and, again, that whilst the two juniors arrive at a different conclusion to that of Barons Pollock and Bramwell, they not only differ themselves in their reasons for such conclusions, but also support the Chief Baron and his brother in many of their arguments, opposed as those were to the pleadings of the Attorney General. It is also worthy of note, that neither Baron Channell nor Baron Pigott once refer to the question of sale, so largely dwelt upon by the defence and the Chief Baron. One would think that here was perhaps the gist of the case. On all hands it is admitted that to equip a ship, with intent to make *personal* use of that equipped ship, in favour of one belligerent against another at peace with this country, is manifestly a violation of the statute, but it is naturally asked whether the sale intervening does not release the builder and equipper from the *gravamen* of the intent charged under the Act? Whether the equipment, as an act of commerce, is equally guilty with that equipment effected for the purpose of personal participation by the equipper in acts of war against a friendly Power? Whether, in fact, there is no difference in the eye of

the law between a transaction in which solely exists the *animus vendendi*, and one against which proof is forthcoming that in the equipment resided the *animus belligerendi?* All must, however, regret, that whilst the judges were unanimous in their opinion that "the equipment" must be a "war equipment," and that the statute was passed to prevent our ports being made "stations of hostile equipment," yet that the divergence of opinion on the question of "intent" being primary or secondary, as regards the "act," still leaves shipbuilders and others in great doubts and uncertainties. These doubts, however, go far to show what will be the inconveniences, annoyances, and hindrances to the trade in ships that will be produced by any straining of the existing law, and form, moreover urgent reasons for the speedy prosecution of the appeal, if appeal is to be made.

CHAPTER IX.

THE LETTERS OF "HISTORICUS."

I SHOULD not have again referred to the Letters of "Historicus"— my comments on which have already appeared in the columns of the *Morning Herald* and *Standard*, — had I not thought that, from the prominent position given them by the *Times*, they had obtained considerable credit, and, as I believe, tended to leave most erroneous impressions on the minds of the public. I will content myself on this occasion with reprinting my comments, simply accompanying them with an extract from the Preface in the book of "Historicus," and one or two remarks thereon.

After referring in that Preface to the different works and treatises on International Law, he says: —

> But of all the sources of authority on these subjects the most valuable—though unfortunately in this country not the best known—are the discussions of the American courts. The policy of neutrality and peace, which was, until the late unhappy events, the sacred tradition of the United States, has brought it about that the rights and duties of belligerents and neutrals have been more fully and minutely discussed in the jurisprudence of that country, than in that of our own. No praise too high can be awarded to a body of decisions which for learning, impartiality,

logic, and good sense are unsurpassed in judicial annals. Nothing gives me greater confidence in maintaining the justice and equity of English practice than the knowledge that on all the great topics of international law, the voice of that which was once the chief neutral power of the world is absolutely in accord with Great Britain, who from various causes has taken the lead among maritime belligerents. It will be seen, that throughout the course of these papers I have largely availed myself of American learning.

In this passage it will be seen that "Historicus" considers the American courts as the highest and best authorities on the subject obtainable, and places the greatest confidence in the justice and equity of the English practice, because American courts are absolutely in accord with those of Great Britain. The reader will see what, after a careful study of the Act, is his deliberate opinion as to what is permitted and what prohibited by that Act, and by consequence by the English statute. The reader will also discern how little that opinion coincides with that expressed in his later Letters, and, unaccompanied as these were by any announcement of a cause for such a change, will appreciate at their due worth the dicta of one who publishes within so short a period two such opposite deductions from the same Act of Parliament. I will but add the remark, that whilst he founds his earlier opinions on precedents, history, and expositions by the framers of the Act, his more recent deductions are without much further authority than his own. His later writings completely

cancel the arguments on the subject in his earlier contributions, whilst we are left quite in the dark as to the convictions that have wrought in him so complete a change of opinion.

"Historicus" has commanded, and, generally speaking, justly, the best attention to those letters of his which appeared some time since in the *Times*, and which have been compiled into a volume. Whilst portraying most graphically the perversion of the law which exists in the work of M. Hautefeuille, and which he says has, to his amazement, been confirmed by Dr. Phillimore in his book on "International Law," he, with assistance from Wheaton, Kent, Story, and others, has given us perhaps the best (because brief and explicit) modern treatise on the general principles of international law. Had he stopped here, and left us undisturbed in the possession of what is really a most valuable volume, he would have saved his readers the dissatisfaction of seeing in a later essay of his that which is nothing less than a glaring contradiction of one of the most important of his legal arguments. In a recent letter to the *Times* on the subject of the "Rams" he expressed a wish, to which I have already alluded, "that we should cut up the mischief by the roots, and not entangle ourselves in the legal difficulties by which the criminal procedure in this case is unques-

tionably surrounded"—that we should, in fact, abandon the prosecution of Mr. Laird, and remonstrate directly with the Confederate Government, on the ground of their instigating our subjects to break our laws, and, indeed, of breaking them themselves. He further advocated reprisals in the event of the Confederate Government refusing to attend to our remonstrances. I will place extracts from his letter and extracts from his book on the same subject side by side, leaving it to the judgment of readers to decide whether the one is not a direct contradiction of the other :—

Evidence very far short of that which might suffice to convict the shipbuilder of a violation of the Foreign Enlistment Act, would justify our government in treating the Confederate authorities as persons procuring or meditating to procure a breach of its spirit or letter. In such a case it seems to me our Government is entitled to say, and ought to say, to the Confederates—"We have distinctly forbidden you to equip, or procure to be equipped in this country ships for the purpose of committing hostilities against a State with which we are at peace. You know our laws, and if you seek to violate them, di-

This authoritative exposition, it will be seen, establishes, first, that the Act was a municipal statute, and that its object was to give power to the neutral Government for its own protection against the intrusive belligerent, not to create any obligation towards, or to supply the means of affording protection to, the injured belligerent. Secondly, it shows that the authors of the Foreign Enlistment Act were not so absurd and illogical as to have forbidden the equipping and arming of a ship for sale whilst they did not forbid the making and selling of a park of artillery. What they forbade to their subjects

rectly or indirectly, we will hold you responsible, and make you answer for the offence."

and to all within their jurisdiction was, the making war on a people at peace with the Sovereign of these realms. The equipping and arming of a ship may, or may not, according to circumstances, be evidence of such an intent; but if the evidence is not such as to establish the belligerent intent, there is no violation of the Act.

Again we find the following discrepancy between the letter and the book:—

Now, whatever doubt or difficulty there may be with respect to the animus of the shipbuilders, there can be none whatever as to that of a belligerent government which effects, or intends to effect, such a purchase. On their part it is indisputably a belligerent and not a commercial intent. As far as they are concerned the ship is equipped, or caused to be equipped, with the direct object on their part of committing hostilities against a foreign State with which the Queen is at peace. They are, therefore, deliberately procuring the consummation of an act which our law has solemnly forbidden. And the procuring of the construction and equipment of a vessel of war in this country by a belligerent State is a far more

I may be permitted, however, to observe that these important decisions prove decisively that the Foreign Enlistment Act was not intended to, and did not, in fact, operate so as in any way to limit or control the absolute freedom of neutral commerce. A subject of the Crown may sell a ship of war, as he may sell a musket, to either belligerent with impunity; nay, he may even despatch it for sale to a belligerent port. But he may not take part in the overt act of making war upon a people with whom his sovereign is at peace. The purview of the Foreign Enlistment Act is to prohibit a breach of allegiance on the part of the subject against his own sovereign, not to prevent transactions in contraband with the

audacious and mischievous insult to our laws than those which I have suggested.

belligerent. Its object is to prohibit private war, and not to restrain private commerce. To equip and arm a vessel of war within the United Kingdom is not, *per se*, an offence against the statute—it is the equipping and arming with intent to commit hostilities against a foreign government which constitutes the misdemeanour. The mere sale or equipment for sale of a vessel is, in itself, no evidence of such an intent, which must be proved conclusively upon some better grounds. The manning of a ship for war purposes, and with a war crew, would be a much more cogent circumstance to lead to the inference of such an intent, because then the commercial speculation can hardly be severed from the belligerent animus.

Thus the book broadly and decidedly asserts that the Act was not intended to impede the absolute freedom of neutral commerce, but was directed against the personal engagement in hostilities by the subject, and not against the *sale* by him; whilst the letter I refer to says that we should tell the Confederate Government that "they are forbidden purchasing ships from us, as that is an action more defiant of our laws than the French Government engaging in contracts with our smugglers." What can have induced "Historicus" to place shipbuilding by our subjects on a footing with smuggling, and the Confederates buying those ships in the same position as the French Government engaging in contracts with smugglers to evade our revenue laws, I cannot imagine. But that the whole tenor of the letter is in direct conflict with his opinions as

expressed in his book, will, I think, be obvious to all.

Indeed, whereas in his book he searches for precedents, and quotes the opinions of those who actually took part in the debates on the Foreign Enlistment Act, in his letter he eschews precedent altogether, deprecates any appeal to the existing law, and would proceed against the Confederate Government in a manner altogether original; and whilst telling them on the one hand that we cannot bring home the violation of the Act to one subject, informs them on the other hand that their inducing that subject to violate that Act, "will cause us to hold them responsible, and make them answer for the offence." In plain words, this municipal act, not having been violated by the subject, is to be made the instrument of action against the belligerent. Having stated in his book his conviction "that a subject of the Crown may sell a ship of war, as he may sell a musket, to either of the belligerents with impunity," he would now revoke that permission, and, as the Act is no sufficient weapon against the neutral subject, he would level it against the belligerent, though confessing at the same time that the Act is municipal. This is throwing aside altogether the important fact that, while the subject is amenable to our municipal law, the belligerent is liable only under international law. "We will preserve our

neutrality within our dominions, but we will not go further," were the words of Mr. Canning and others, in reply to the complaints of the Turks against Lord Cochrane and certain parties who were assisting the Greeks.

He commences another letter by recognising the Foreign Enlistment Act as a municipal law, and this, though not a novel admission of his, is of great importance to my present observations. I would just mention that another proof of its municipal nature, and consequent inutility as a weapon against a foreign State, is found in its wording—"That if any natural-born subject of his Majesty within any part of the United Kingdom, or in any part of his Majesty's dominions beyond the seas," &c. "Historicus," after giving us, in detail, the intercepted Confederate despatches, proceeds to assert that "it is patent on the face of these documents, that a special fund has been provided, and a special mission established, by the Confederates, for equipping, fitting out, and arming vessels in this country without her Majesty's licence, for warlike operations against the dominions, ships, and goods of a foreign State." Is this not a direct accusation of a violation of our Foreign Enlistment Act against the Confederate Government? And yet "Historicus," in the same breath, describes this Act as municipal. He has quoted Mr. Canning as saying, under

that Act, "We will preserve our neutrality within our dominions, but we will not go further." He has himself said that the purview of the Foreign Enlistment Act is to prohibit a breach of allegiance on the part of the subject against his own sovereign, not to prevent transactions in contraband with the belligerent. He has laid down as law under the Act, that "a subject of the Crown may sell a ship of war, as he may sell a musket, to either belligerent, with impunity; nay, he may even despatch it for sale to a belligerent port." He also establishes, from Mr. Huskisson's exposition of the Act, two very important priciples—first, that the Act was a municipal statute; and, secondly, that the authors of the Act were not so absurd and illogical as to have forbidden the sale of an armed and equipped vessel, while they did not forbid the sale of a park of artillery. And, by the way, I find that the United States Government asserted in 1855 that "their Act of Congress prohibiting foreign enlistment was a matter of domestic or municipal right, as to which foreign governments had no right to inquire." Clearly the quotations from the book of "Historicus" show how inconsistent is the wish to remonstrate in any shape with the Confederate Government on the plea of a violation of our Foreign Enlistment Act. If, as "Historicus" argues, it is lawful to sell a ship of war to the Confederate Government, how

would he have that Government become possessed of that ship? If the sale by the neutral is lawful, surely the purchase by the belligerent is equally lawful. And, again, if the sale is lawful, is there any proof of offence against either international or municipal law in the order contained in the Confederate despatches? Is there a word that could convict Mr. Laird of any intention of participating in hostilities? Do they not expressly speak of a contract, an ordinary business matter, and, as far as the shipbuilder is concerned, a mere question of sale and purchase? Are not all the letters of a business character? True, one points to the necessity of avoiding the interference of European governments; but this, in my opinion, is a proof of their wisdom in anticipating the desperate efforts the Federals would make to prevent them from becoming possessed of such formidable vessels, rather than an acknowledgment that they contemplated a violation, of a wilful nature, of our laws.

"Historicus," recognising the true position of the statute as municipal, says also, "It is the interest of Englishmen and the duty of the English Government to see that the law, while it is a law, is enforced against all persons who seek to violate or evade it, whether they be within or without the realm." I would ask what success a counsel would expect in prosecuting a person "without the realm" for

violating an act levied specially and solely against those "within the realm"? But this course of procedure, absurd as it may seem, is the one actually urged by "Historicus" in his later writings. The position he is in is undeniably this—Mr. Laird may lawfully sell an armed ship to the Confederates, and the Confederates may as lawfully buy that ship. They send their order to an agent in this country, and Mr. Laird executes that order. But at the same time Mr. Laird, it would appear, is guilty of a violation of the Foreign Enlistment Act, and the Confederate Government is equally guilty; but, as "Historicus" is conscious that the law as it exists would present considerable difficulty in the prosecution of Mr. Laird, he would prefer the abandonment of such a prosecution and substitute in its place remonstrance, and, if necessary, forcible reprisals against the Confederate Government. Knowing well that our subject has the means and abilities to protect himself from any attempted misconstruction of the law, he advocates the adoption of brute force against that Government already struggling under almost superhuman difficulties, and which has no status upon which it could defend itself against our accusations.

Previous to the conversion of "Historicus" to Northern "proclivities," his arguments were of the highest order of legal reasoning. His own opinions

were intruded but sparsely, and his book was valuable for the sole fact that it was a compilation in the most convenient and interesting form of the judgments, opinions, and precedents, which were golden in their worth from their well-known high authority and evident bearing on the case in point. It was in the admirable selection of cases *ad rem*, rather than in his treatment of the several phases of this American difficulty, that the excellence of his earlier letters consisted. I know not whether the second edition of his writings is to be laid before the public in the shape of a book, but sure I am that if that should be done, there will be a sad contrast between his earlier and more recent volumes. Law formed the essence of the one; self-opinionated effusions will, in the main, form the contents of the other. In his published book he has taken all possible pains to impress upon the public that the object and aim of the authors of the Foreign Enlistment Act were to prevent overt acts of war on the part of his Majesty's subjects against foreign States at peace with us; that they had no intention of preventing the traffic in contraband between the neutral and belligerent; and that, with a wisdom which foresaw that ships might be as valuable to one belligerent as munitions of war to the other, they had no wish that the law should forbid the building and sale of ships of war while it allowed the manufacture and sale of a park

of artillery. Now, however, in place of references to the highest authorities available, he gives us his own opinions; and to such a certainty of the forfeiture of these rams and the conviction of their builders has he in his own mind brought himself, that at the least he must expect, when the case is called for trial, that the defendants will, on their own account and on that of the Confederate Government, plead guilty, and confess to a wilful violation of our statute. The matter is so plain, he says, that "no good lawyer or man of common sense can have any reasonable doubts." And this is now the opinion of "Historicus," who has occupied many columns of the *Times* in elaborate efforts to prove that Mr. Laird may sell ships of war to the Confederate Government. I leave the public to judge whether my charge of inconsistency against him is not fairly established. But this volatile writer himself complains of being "misunderstood and misrepresented." He has been unfortunate enough on a previous occasion to have been equally "misunderstood." In the matter of reprisals against the Confederate Government which he advocated, he had to explain that he did not intend such precipitate action as might at first sight appear. On this occasion, however, he has done more, and has thought fit to alter altogether the sense of the passage he alleges to have been misrepresented. This chief charge of

inconsistency against him was that, whereas in his book he has always held the Foreign Enlistment Act as municipal, and has extracted from authoritative expositions of that Act that under it the sale of a ship of war to a belligerent is perfectly legal, and that, moreover, "the one belligerent could claim no rights under that statute as against the other belligerent, but that our position towards both was one of imperfect obligation only," he now in his present writings asserts that the Federals have just grounds of complaint and dissatisfaction against us for not having sooner enforced our Foreign Enlistment Act; that that Act has been probably violated by Mr. Laird, but certainly by the Confederate Government; and that though it might be difficult to prove the offence against the former, it would be much more susceptible of proof against the latter. Let me here quote his own words :—

> There can be no two opinions as to the difficulty and danger of the questions arising out of the violation of our neutrality alleged to be meditated by the Government of the Confederate States in breach of our Foreign Enlistment Act. That Foreign Enlistment Act is a municipal law, and a breach of that law is a matter primarily concerning ourselves, and the offending person or State.
>
> Now, no government will permit any person or persons, whether they be a subject or a foreign State, to violate its laws with impunity.
>
> Yet the procuring of the construction and equipment of a vessel of war in this country by a belligerent State is a far more

audacious and mischievous insult to our laws than those I have stated.

We have distinctly forbidden you to equip or procure to be equipped in this country ships for the purpose of committing hostilities against a State with which we are at peace. You know our laws, and if you seek to violate them we will hold you responsible, and make you answer for the offence.

These passages from the recent letters of "Historicus" show, I think, beyond all reasonable contradiction, that he distinctly considers the Confederate Government as amenable to our laws in general, and to the Foreign Enlistment Act in particular. But to come to the actual quotation which he accuses me of "misunderstanding and misrepresenting." After giving certain extracts from the Foreign Enlistment Act, he proceeds to say, "It is the better opinion that this act is rather a municipal law than an edict passed in obedience to an international obligation. I mention this to show that I recognise its true position. It is the interest of Englishmen and the duty of the English Government to see that *this* law, while it remains a law, is enforced against all persons who seek to violate or evade it, whether they be within or without the realm."

I distinctly asserted that he assumed the violation of the Foreign Enlistment Act by the Confederate Government: where is my misunderstanding? I said that he would enforce this municipal law against the Confederate States: where is my misrepresenta-

tion? True, in his letter he sees fit to qualify that doctrine by substituting *the* law for *this* law; but where one expression is but a mere truism, the other is the very essence of that inconsistency which I have endeavoured to point out—viz., that of applying a statute confessedly municipal against a foreign State, or against persons without the realm. His reminder "to those who embark in such enterprises that there is such an offence known to the law as a conspiracy to commit a misdemeanour," is very impressive. After threatening those without the realm, as well as those within it, with merciless pursuit and punishment under a municipal statute, he would now, for "strategic reasons," fall back on that law which makes conspiracy to commit a misdemeanour an offence punishable, but only then on proof and within our jurisdiction. Having abandoned the prosecution of Mr. Laird under the Foreign Enlistment Act, "on account of the legal difficulties by which the criminal procedure is surrounded," and having proposed instead that we should treat the Confederate Government as persons violating our Foreign Enlistment Act, he would now withdraw even that mode of proceeding, and attempt the punishment of Mr. Laird, or the Confederate Government, or both, under that law which he says makes a conspiracy to commit a misdemeanour an illegal act. So that our Foreign Enlistment Act,

which has been twisted into every possible construction, is now declared not to hold in the present emergency, and a fresh law altogether invoked to his aid in his generous wish to procure at all hazards the conviction of Mr. Laird, and the consequent forfeiture of the ships. But, further, says "Historicus," it is equally the interest and duty of a government to protect its laws from attacks directed against them from without." A very obvious duty this; but a very different undertaking from that urged by him in his previous letter—viz., that we should enforce a statute specially addressed to those within our jurisdiction, against a government and people who are, as a matter of course, without that jurisdiction. "Historicus" again brings forward his example of the smugglers, and asks whether, if we found a foreign government in league with them, we should content ourselves with merely proceeding against the smugglers in the Court of Exchequer. I must a second time draw attention to the unfairness of placing smugglers, known lawbreakers and desperadoes, in the same category as shipbuilders who, like the Messrs. Laird, may be under the imputation of a desire to violate our laws, but against whom nothing is as yet proved. The very existence of the smuggler depends on his cheating our laws; while the Messrs. Laird are at present guilty of nothing more than pursuing their ordinary and legitimate

occupation. I must also remark that though we might not possibly content ourselves with proceeding against these smugglers, we certainly should not put in action in such a case against the foreign government any law or statute expressly made for the controlling of our own subjects.

"Historicus" has said, in his book, "that the mere sale of an armed ship is in itself no evidence of hostile intent against a foreign Power; but that the manning of a ship for war purposes, and with a war crew, would be a much more cogent circumstance to lead to the inference of such an intent." In the case of M. Genet, as in that of the *Irresistible*, also referred to by "Historicus," we find that the ships were fully armed, and manned with a war crew. Therefore, I think I am justified in saying that there was more cogent evidence in these cases than in the present; where neither have the ships been armed, in the ordinary acceptation of the word, nor have they as yet been manned with a war crew. In the American precedents quoted, there was that combination of armament which Mr. Canning especially described as being the actual offence against the Act. But in Mr. Laird's case the only witness against him is the bare hull of a ship of war. "Historicus" has slurred over the case of the *Santissima Trinidad*, merely saying that it has been often cited. So it has, and by himself in his book when his object was

to show that the authors of that Act, in America, considered it no actual offence that a ship of war should leave American ports, so long as the owners did not themselves contemplate hostilities.

And let us specially remember that these American cases now cited are not instances of the condemnation of the vessels themselves, but are trials in the American courts as to the validity of captures made by them. In our case, we shall have to try the question of the original ships themselves, which is a matter of a far more important nature, involving the most delicate adjustments of the law.

Mr. Lindsay put some very searching questions for the consideration of "Historicus," who "thinks he can answer them shortly and satisfactorily." I beg particular attention to this answer, for on it is based the whole question of what his present view of the law is, and which I assert and will prove is diametrically opposed to his previously published opinions. He answers:—

1. An English merchant may manufacture cannon and all the munitions of war for a belligerent, because there is no law to prevent it.

2. An English shipbuilder may not equip a vessel of war or a transport for a belligerent, because there happens to be an English Act of Parliament which expressly prohibits his so doing.

3. The English Government do not interfere with the first class of transactions because they have no authority to do so; they stop the second because it is their business to enforce the law.

As regards the first answer, it undoubtedly is a

fair reply to the second question of Mr. Lindsay, but it is a manifest shirking of the third question of that gentleman, who wants to know why, if by law a cutler or cannon-founder may send "sabres and muskets to New York, a shipbuilder may not send a steam-ram to Mobile?" "Historicus," doubtless, remembers that there was a proclamation by the Queen, on the 13th of May, 1861, denouncing as illegal the carrying of munitions of war to the belligerent ports, and with that edict before him how could he reconcile to himself the wicked inconsistency which exists in allowing one subject to break the known law in favour of the Federals, while extreme measures of severity are deliberately and insultingly carried out against another subject on the mere suspicion of a violation of a statute considered by many, at the best, as of very doubtful bearing on the alleged offence, and which has already been interpreted by one judge and jury as distinctly permitting that very act for which the Messrs. Laird have been thus dealt with?

But now for the second answer of "Historicus." Will it be credited that it is from the man who has written thus? "Historicus," p. 169:—

To equip and arm a vessel of war within the United Kingdom is not *per se* an offence against the statute.

Page 171. — Secondly, it shows that the authors of the Foreign Enlistment Act were not so absurd and illogical as to have forbidden the equipping and arming of a ship for sale, whilst

they did not forbid the making and selling of a park of artillery. It will be seen that this doctrine, laid down on the conjoint authority of Canning and Huskisson, is identical with that established in the case of the *Santissima Trinidad*, and it is both law and common sense, which are not so seldom coupled together as ignorant persons are apt to suppose.

And again, p. 168:—

The Foreign Enlistment Act is directed, not against the *animus vendendi*, but the *animus belligerendi*. It prohibits warlike enterprises, but it does not interfere with commercial adventure. A subject of the Crown may sell a ship of war, as he may sell a musket, to either belligerent with impunity—nay, he may even despatch it for sale to the belligerent port.

I think these quotations too clearly establish my accusations of great and irrevocable inconsistency to need much further comment. I will add, however, a few prophetic remarks of "Historicus" in his preface to his volume:—

Those who assume the authority of publicists, exercise in some sort the judicial function of life and death; and so, according as they guide or pervert the judgments of their age, they affect the destinies of nations, and determine the misery or the happiness of whole generations of mankind.

It has been the shame of some to have degraded the palladium of law into the minister of the temporary passions of government, and the servile instrument of the interests of States. I trust that the Administration which may be charged with the fortunes of this empire, to whatever party they may belong, will sustain the same superiority above the solicitations of interested partizans and the clamour of ignorant passion.

Are not these latter quotations a fitting commentary on the opinions of "Historicus" as now set

forth? And are not the remarks as to a perversion of the law receiving now through the pen of the writer of them himself a most signal realisation?

In the third portion of his answer "Historicus" says the reason for non-interference in the first class of transactions, that of dealing in warlike munitions, is the lack of authority. Here again he avoids noticing that authority which was put in motion to draw attention to the illegality of that which is of daily occurrence—viz., the conveying in our very mail-packets contraband to the belligerent port of New York. And he says they stop the second class of transactions, that in which the Messrs. Laird are concerned, because it is their business to enforce the law. "It is the duty of the English Government," says "Historicus," "to enforce the law against all those who seek to violate it." Let this duty be impartially carried out, then; if the law is against armed ships quitting these shores for the South, let them be detained, but in conjunction with the arrest of the export of arms and other munitions of war in our mail-packets to the North. But without this joint action it would be, as I showed in an earlier letter, most unjust at this stage of the war to prohibit to the one only, what has been for three years of war allowed freely to both belligerents. Side by side in the Mersey lie these "rams" and our mail-steamers, both in a legal sense liable to capture by

a belligerent, the one as being contraband in itself, and the other for having contraband on board. The belligerents have thus equal grounds of "complaint and dissatisfaction" against us for making our ports those of departure for such articles of contraband; or, at all events, if the North may call upon us to enforce our laws against the South for an alleged infraction of our Foreign Enlistment Act in the matter of equipping ships, so the South may dictate to us to see the same law enforced against the North in the matter of their instigating our subjects to carry to their ports arms and munitions of war.

CHAPTER X.

CONCLUDING REMARKS.

FEW can witness the prosecution of a large and highly respectable firm without evincing strong feelings of sympathy in their behalf. Had that firm been notoriously guilty of open infractions of ordinary commonplace laws, men would have viewed with satisfaction their trial and condemnation. But that men of influence and position like the defendants in the *Alexandra* case and the Messrs. Laird should have their yards invaded by police and military, and should themselves be arraigned on the informations of the vilest of spies and informers, were facts sufficient to arouse the indignation of many and the sympathies of most of their countrymen. Above all, that they should be the first in this country to be prosecuted under that Act, which on all sides is said to be at the best but doubtful, raised a further degree of consideration for them. This was again increased when it became evident that the prosecutions were pressed upon the Government by a clique whose only pretensions to any importance in England consisted in the fact that they retained some appearance of consistency and

coherency, by hoisting the colours of those glorious men of old, Buxton, Brougham, Wilberforce, and others, and who by assuming the title of the Emancipation Society attempted under that title to appropriate to themselves that hard-earned reputation which had so worthily been attained by their predecessors. That they have not succeeded is too plainly shown by the cold indifference exhibited towards them by Lord Brougham and the descendants of those very leaders, Buxton and Wilberforce. These latter, in their speeches and writings, have clearly denounced the existing Society as altogether unworthy of being allowed the title of successors of the original heroes of anti-slavery. Whilst the founders of such a really noble cause gave their best intellects to the sole object of furthering the manumission of slaves in *our* dominions, these successors, having no such aim left them, have certainly devoted some small efforts to the extinction of slavery in a foreign State; but having allowed these efforts of late years to subside, they have only revived them when their originally sacred cause has become submerged in attempts to support the so-called freedom of the black at the expense of the white population, who received the institution of slavery as a forced legacy from England. That Society, which originated in the pure fount of real humanity, has degenerated into a political clique,

which exists at the present moment but to support, under the pretence of Abolitionism, the most hateful and barefaced attempt at subjugation, nay, as boldly asserted by certain Abolition leaders, even an extermination—"Greek fire for the masses, Hell fire for the leaders." That such a society so constituted, and with such ends in view, should be taking the initiative in aggression against sound and respected subjects of the Crown, speaks volumes as to the animus of the present prosecution. Our Government may be the nominal prosecutors, but Brownlow, Ward Beecher, and their English dupes and partizans, are the instigators.

Such facts will be well weighed by English juries, who will without fail give the benefit of the doubt, if doubt exists, to those who in the ordinary course of their daily trade are rendered liable to such assaults at such hands. The Navy of England, both military and mercantile, and our trade in shipping, are too popular and too closely connected with our dearest interests to be wilfully sacrificed to the demands of such men as these, now doing their best to procure the downfall of the most vital portion of our naval interests, and who, in all that concerns their native country, are invariably found to take that view opposed to the general good of this land and its best institutions. As this Society and its adherents, from a mixed intention of good and

evil, and from mingled ideas of morbid philanthropy, and the assistance of the Yankee attempt at subjugation of a great and high-spirited people, are stealthily working for the furtherance of those ends, they are supported by a certain set of politicians in this country, who use every effort and miss no opportunity to vilify everything English, and to laud with fulsome adulation everything American. We have, moreover, a Government, who, dependent in great measure for their existence upon the support of the Radical portion of our representatives, are compelled to keep in view their constant conciliation. This may explain a passage notable for its rashness in a speech lately uttered by one of their body. Mr. Layard, in addressing his constituents a short time since, put a question and provided an answer which, if founded on actual law, should lay to rest all further doubt of the righteousness of the prosecution of our shipbuilders. "Why," he said, "it is asked, may we sell muskets to belligerents whilst we may not sell ships? Because," said he, "the one is allowed, but the other is forbidden by law." I venture to challenge Mr. Layard to reveal that law in the Statute Book of England containing such prohibition. If such law is extant there can be no further need of discussion: let the Attorney-General produce it, and there is an end to the case. If this, moreover, is so, why in the ninety-eight counts

against the *Alexandra* is there not one to stigmatize the sale of the ship as unlawful? If the sale is illegal, why waste so much time in attempting to prove the equipment and intent? Why are not all efforts concentrated with a view to prove sale and destination? If the sale is unlawful under our statute, and that statute is an admitted copy of the American model, how can it be explained that the Supreme Court of the United States declares in the case of the *Trinidad*, that "there is no law preventing their citizens selling ships of war to belligerents?" If our statute forbids the sale of a ship to a belligerent, how is it that "Historicus," who has ventilated the subject in every possible form, has arrived at the deliberate conclusion, viz.: "That from the authoritative expositions of the Act by Canning and Huskisson, a subject may sell a ship of war, as he may sell a musket, to a belligerent?" How was it that Lord Palmerston stated in the House "that he believed, had he stopped the *Alabama* the Government would have been liable for damages?" Earl Russell has, "after anxious consideration of the question with his colleagues, decided that it must be shown that the owners intend to employ in a hostile way the said ships." This decision is in exact accordance with the rule of Washington and the judgments of the Supreme Court of the United States. It is also the identical order issued to the Collectors

of Customs at the United States ports, "that they shall detain no vessels, though manifestly intended for warlike purposes, where the owners give security that they (the owners) do not intend using them in a manner hostile to those at peace with the United States." The more the matter is debated in our courts and "out of doors" the better founded will become the suspicion that Earl Russell, the responsible Foreign Minister of our Government, having at first made a stand upon grounds of existing law, justice, and precedent, has, at the eleventh hour, unhappily for the independence of himself, his Government, and his country, seen fit to knuckle under, not to the firm and dignified remonstrances of a foreign ambassador, not to honourable, openly expressed demands of an indignant people, but to the cowardly and underhand pressure brought to bear upon him by the miserable remnant of what was once a great and glorious band of honest Abolitionists, and by that section of politicians in this country who seek to elevate everything American, or rather Yankee, upon the ruins of British Institutions. Sure I am, that ere long the scanty veil of hypocrisy will be torn from the brows of these men. Those thoroughly honest though rough sentiments of our English citizens of all classes, which, though tardy in coming to the surface, are certainly ever existing with us, will then be developed, and, as we

have always experienced, will produce such a reaction as will carry all before them; and then will be duly appreciated the services of those who are now assisting in the laudable and manly attempt at crushing the weak, subjugating the brave, and exterminating the helpless,—and all this for the merest idea!

COX AND WYMAN, PRINTERS, GREAT QUEEN STREET, LINCOLN'S-INN FIELDS, LONDON.